86 1569

No. ____



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

ALUMINUM COMPANY OF AMERICA,

*Petitioner,*

—v—

DAVID SLIMAN and CAROLYN SLIMAN,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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## QUESTIONS PRESENTED

1. Whether retrospective imposition of punitive damages for failure to satisfy a newly created legal duty violates the Due Process Clause.[1]

2. Whether a litigant subjected on appeal to a newly created legal duty is constitutionally entitled to a new trial as to whether it met its new duty and, if it did not, whether it should be subjected to punitive damages for its earlier failure to have met that duty.

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1 The Court has noted probable jurisdiction in *Bankers Life & Cas. Co. v. Crenshaw*, Docket No. 85-1765, a case in which this issue is one of several presented but in which it need not be reached. If the issue is reached in *Bankers Life*, the decision would be applicable here. *See, e.g., Henry v. Collins*, 380 U.S. 356 (1965) (per curiam) (application of constitutional rule announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to libel judgment on certiorari to Supreme Court of Mississippi); *Hughes v. Hughes*, 441 U.S. 901 (1979) (application of decision in *Orr v. Orr*, 440 U.S. 268 (1979), to case on appeal from Supreme Court of Alabama notwithstanding that Alabama courts had held federal question not timely presented).

## PARTIES TO THE PROCEEDING

The names of all parties to the appeal to the Idaho Supreme Court are provided in the caption to this Petition. Sup. Ct. R. 21.1(b). In addition, Seven-Up U.S.A., Noel Canning Corporation, 7-Up Bottling Company of Twin Falls, Idaho, and Safeway Stores Incorporated were defendants at the trial of this action.

## STATEMENT PURSUANT TO RULE 28.1

Petitioner Aluminum Company of America has no parent company. The companies (other than wholly-owned subsidiaries) in which Alcoa has an ownership interest are listed in the Appendix at 59a-64a.

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## OPINION BELOW

The opinion of the Supreme Court of the State of Idaho affirming the judgment against Alcoa is reproduced in the Appendix at 1a-25a, and is reported at 731 P.2d 1267. The order of the Supreme Court of the State of Idaho denying Alcoa's petition for rehearing is reproduced in the Appendix at 29a-30a. This order is not reported.

## JURISDICTION

The Supreme Court of the State of Idaho filed its opinion affirming the judgment against Alcoa on November 24, 1986. Appendix 1a-25a. In what it described as a "[case] of first impression," the Court announced that a component manufacturer has a duty to warn ultimate consumers of risks associated with the finished product's use; deviating from the trial court, the Court held that the duty could be satisfied by providing an adequate warning to an intermediary. Appendix 6a-10a. A compensatory and punitive damages award against Alcoa was affirmed on the

ground that the jury "could have found" that Alcoa failed to discharge that newly created duty. Appendix 10a-11a.

As discussed below, this disposition implicated federal constitutional questions not previously in issue—namely, whether retrospective imposition of punitive liability for violation of a newly created legal duty contravenes due process and whether a litigant subjected on appeal to a newly created legal duty is constitutionally entitled to remand for retrial under appropriate instructions. Both issues were raised in a timely petition for rehearing, which was filed pursuant to Idaho Supreme Court Rule 42. Appendix 31a-51a. That petition was denied, "after due consideration," on December 31, 1986. Appendix 29a-30a. Since the petition for rehearing was the first opportunity to raise these federal claims, they were properly presented and preserved. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. ____, 106 S. Ct. 1580 (1986); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930). This Court therefore has jurisdiction to review the judgment below under 28 U.S.C. § 1257(3).

## CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV:

> No State shall . . . deprive any person of life, liberty, or property without due process of law . . .

## STATEMENT OF THE CASE

As the size and frequency of punitive damages awards have increased, there has been growing recognition that important constitutional questions are presented when they are imposed. The issue whether punitive damages may be retrospectively imposed under a new cause of action is one that this Court has recognized "must be resolved." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. ____, 106 S. Ct. 1580, 1589 (1986). It is one of several issues before this Court in *Bankers Life & Cas. Co. v. Crenshaw*, Docket No. 85-

1765; but it need not be reached there.[2] This issue is squarely presented here. In addition, as the "torts explosion" continues, and new causes of action are increasingly recognized, the issue of whether a party has a right to be heard on whether it has met a newly articulated duty, and if it did not, whether it should be punished for previously failing to meet that new duty, also presents an important question under the Constitution.

Aluminum Company of America ("Alcoa") supplies unfinished aluminum shells to soda bottlers. After a bottle is filled with a carbonated beverage, the bottler manufactures an ordinary twist-off cap by placing an unfinished shell on the top of the bottle and using a capping machine to roll threads into that shell.

Plaintiff was injured in 1979 when she used a pair of needle-nose pliers to tear the cap from a bottle of Seven-Up. She testified that she had never opened a soda bottle with a twist-off cap before, and believed that was how it must be done. By tearing the cap from the bottle, she caused it to lose its grip on the bottle, and the pressure from the carbonation in the bottle caused the cap to eject into her eye.

Plaintiff sued Alcoa, Seven-Up U.S.A. Inc., the national Seven-Up franchisor that, among other things, prescribes the label that its franchisee bottlers use, and several others. She did not contend that either cap or bottle was defective or that she would have suffered injury if she had simply twisted the cap off the bottle, as approximately 83,000,000,000 other aluminum caps had been removed prior to her injury. Instead, plaintiff claimed that both Seven-Up U.S.A. Inc. and Alcoa should have provided instructions on proper removal of the twist-off cap and that both had a duty to warn that the cap might cause injury.

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2 In *Bankers Life & Cas. Co. v. Crenshaw*, the punitive damages award of $1,600,000, in a case involving an underlying insurance claim of $20,000, is also being challenged under the Excessive Fines and Contract Clauses.

The jury was charged that a manufacturer may be liable if a product has "dangerous propensities" and it "fails adequately to warn purchasers or users" of that fact. (Inst. 21.)[3] The jury was further charged that this duty is shared equally by "any person who designs, manufactures or remanufactures that product *or any component parts* before its sale to a consumer." (Inst. 17, emphasis added.) The jury was also told that it could award punitive damages in "an amount which will, by punishing the defendant or defendants involved, serve to deter the defendant or defendants and others from engaging in similar conduct in the future." (Inst. 45.) The jury found for plaintiff and awarded compensatory damages of $100,000. Additionally, Alcoa and Seven-Up were found to have shown "a reckless disregard for plaintiff's safety," and each was ordered to pay punitive damages of $100,000. Appendix 57a-58a.

On appeal to the Idaho Supreme Court, Alcoa contended that it could have no duty to warn ultimate consumers of risks associated with its customers' products. In a 3-2 decision, the majority held that it could, recognizing that "the question of when a manufacturer of a component part has the duty to warn of risks associated with it is one of first impression before this Court." Appendix 6a-7a.

Differing with the trial court, the Idaho Supreme Court further held that "a component part manufacturer also should be able to issue warnings through an intermediary," Appendix 7a, explaining that "the adequacy of the warning given the intermediary is for the jury to determine." Appendix 10a. Although Alcoa had warned bottlers in a number of ways of the possibility of injury from improperly applied caps, the Supreme Court nonetheless affirmed the damages awards (both compensatory and punitive) on the ground that there was evidence from which the jury "could have found" that Alcoa's warnings were inadequate. Ap-

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3 All of the relevant instructions from the jury charge are reproduced in the Appendix at 53a.

pendix 10a-11a. In fact, the jury made no such finding. Indeed, the jury had no occasion to consider the adequacy of Alcoa's warning to the bottler, because it had been instructed only on Alcoa's duty to warn the ultimate consumer.[4]

Alcoa petitioned for rehearing. It challenged the Court's allowance of punitive damages "under a standard first promulgated by [the Idaho] Court in this appeal." Appendix 49a. After noting several decisions of this Court, Alcoa urged that "such a verdict violates Alcoa's right to due process of law under the Fourteenth Amendment to the United States Constitution." Appendix 49a. In addition, Alcoa sought a new trial under appropriate instructions regarding the warnings to an intermediary, so it would enjoy "its Constitutional right to have its conduct tried by a jury under proper instruction." Appendix 38a. It urged that "due process considerations dictate that Alcoa be given a chance to try the issues of the adequacy of its warnings to bottlers. . . ." Appendix 41a-42a. The petition for rehearing was denied by the Idaho Supreme Court "after due consideration." Appendix 29a-30a.

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4 The majority of the Idaho Supreme Court relied on a 1986 decision of the Texas Supreme Court holding that Alcoa might be liable in these circumstances. *Alm v. Aluminum Co. of Amer.*, 717 S.W.2d 588 (Tex. 1986). Unlike the Idaho court, however, the Texas court recognized that the case must be remanded for further proceedings in light of its opinion.

## REASONS FOR GRANTING THE WRIT

Recent awards of punitive damages are, in both incidence and amount, literally unprecedented. Once largely limited to cases of malicious motivation, punitive damages are now routinely sought and recovered in ordinary tort litigation.[5] Not only are such damages imposed with astonishing frequency; they are also assessed in amounts that are wholly unpredictable and excessive.[6] The risk that they "may be employed to punish unpopular defendants" has also been recognized.[7]

It has been "recognize[d] that the alleged deterrence achieved by punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 780 n.4 (1985) (Brennan J., dissenting, quoting *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting)). The mere presence of such a claim can have an *in terrorem* effect, forcing a party to settle a case it would otherwise elect to defend. *Cf. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975).

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5 "There were more punitive damages awards in 1980 and 1981 than in the entire prior history of the United States." *Symposium Discussion: Punitive Damages*, 56 S. Cal. L. Rev. 155, 160 (1982) (statement by Malcolm E. Wheeler).

6 *See International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50 (1979) ("Because juries are accorded broad discretion both as to the imposition and amount of punitive damages,. . . the impact of these windfall recoveries is unpredictable and potentially substantial") (Marshall, J., writing for himself and Justices Brennan, Stewart, White and Powell); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused") (Powell, J., writing for himself and Justices Stewart, Marshall, Blackmun and Rehnquist).

7 *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 50 n.14 (1979) (Marshall, J.).

The growth of punitive damages has occurred at the same time that courts, particularly in certain states, have shown an increasing willingness to adopt new theories of liability, especially in the area of products liability; the nation finds itself in the midst of a "torts explosion." Every year, American manufacturers produce millions of products, most of which are capable, under certain conditions of misuse, of causing serious injury. The prospect of massive and uncontrolled liability, both compensatory and punitive, for producing such products fairly may be said to imperil the stability and competitiveness of American industry.[8]

Not surprisingly, the explosion in liability has given new urgency to long-standing questions regarding the constitutionality of certain aspects of the law of punitive damages.[9] Among the most pressing of these unresolved constitutional questions is whether retrospective imposition of punitive liability under a newly recognized legal standard is constitutionally permissible. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. ____, 106 S. Ct. 1580, 1589 (1986). In addition, as new causes of action are being increasingly recognized by appellate courts, important questions under the Constitution arise as to a litigant's entitlement to remand and retrial under appropriate instructions to determine whether a new duty has been met and, if not, whether it should be punished for a previous failure to meet that new duty. Each of these questions is discussed below.

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8 *See generally* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 1-6 (1982).

9 *See, e.g.*, Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986); Grass, *The Penal Dimensions of Punitive Damages*, 12 Hastings Const. L.Q. 241 (1985); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983).

## I.

## WHETHER RETROSPECTIVE IMPOSITION OF PUNITIVE DAMAGES FOR FAILURE TO SATISFY A NEWLY CREATED LEGAL DUTY VIOLATES THE DUE PROCESS CLAUSE.

The Framers abhorred retroactive law-making. This hostility is recorded in an unusual array of constitutional restraints against retroactivity. Art. I, § 9 prohibits the federal government from enacting any "Bill of Attainder or ex post facto Law." Art. I, § 10 places identical restrictions on the states. These provisions bar retroactive enlargement of the criminal law by legislation. Retrospective judicial enlargement of the criminal law is similarly prohibited by the Due Process Clauses of the Fifth and Fourteenth Amendments. *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347 (1964). Additionally, the Art. I, § 10 proscription of laws "impairing the Obligation of Contracts" extends the protection against retroactivity to non-penal legislation. *See, e.g., Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

The constitutional hostility to retroactive lawmaking is comprehensive, but it is not uniform. The intensity varies with the type of law. Specifically, the constitutional disfavor of retroactive law-making increases with the law's punitive character. The Bill of Attainder and Ex Post Facto Clauses, which create a nearly absolute ban on retroactive penal legislation, present this constitutional disfavor at its most intense.

Even non-criminal legislation, however, may be subject to searching constitutional scrutiny if its aim is to punish for past acts. *De Veau v. Braisted*, 363 U.S. 144, 160 (1960). *See also Cummings v. Missouri*, 4 Wall. (71 U.S.) 277 (1867), and *Ex parte Garland*, 4 Wall. (71 U.S.) 333 (1867) (invalidating professional disqualifications for former Confederates). On the other hand, a law completely devoid of punitive purpose is subject to less demanding review. *See,*

*e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1975) (holding that retroactive imposition of purely compensatory liability is unconstitutional only if arbitrary or irrational). Even in a non-punitive context, however, the constitutional disfavor for retroactive lawmaking exists. *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (holding that repeal of a statutory assurance to bondholders violated the Contract Clause).

While punitive damages are not overtly criminal, they are clearly a form of punishment. The jury here was so instructed. (Inst. 45; Appendix 53a.) As stated by then Justice Rehnquist, writing for himself, Chief Justice Burger, and Justice Powell, punitive damages "are assessed for the avowed purpose of visiting *a punishment* upon the defendant." *Smith v. Wade*, 461 U.S. 30, 58 (1983), quoting C. McCormick, *Law of Damages* 275 (1935) (emphasis added by Justice Rehnquist).[10]

This conclusion is also compelled by this Court's test for determining when non-criminal sanctions are punitive for purposes of constitutional analysis. In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), the Court identified seven factors relevant to that inquiry:

> "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it

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10 *Accord*, "Punitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.' " *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979), *quoting Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). *See also Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting) (noting that punitive damages "serve the same function as criminal penalties").

> appears excessive in relation to the alternative purpose assigned. . . ."

With the possible exception of the first, each of these factors confirms the punitive character of punitive damages. As the name suggests, such damages historically have been regarded as punitive in nature. As with other forms of punishment, scienter is required. Obviously, punitive damages further the goals of retribution and deterrence. Moreover, the behavior punished by punitive damages is usually subject to criminal prosecution. Finally, no alternative purpose rationally can be assigned to punitive damages, largely because of the entire lack of relation between the size of punitive awards and any nonpunitive purpose that might be imagined for them. In short, the *Mendoza-Martinez* factors confirm that punitive damages are, under the Constitution, a form of punishment.[11]

In the case at bar, Alcoa was punished for its failure to anticipate in 1979, when it sold the aluminum shell which became the cap which injured plaintiff, that the Idaho Supreme Court would decide this case of first impression the way it did. As discussed above, the Due Process Clause prohibits retrospective imposition of punishment and punitive damages are a form of punishment. Accordingly, the Due Process Clause must be construed to prohibit the retrospective imposition of punitive damages for failure to adhere to a standard of conduct that did not exist when the conduct occurred.

Thus, this case squarely raises the question whether retrospective imposition of punitive liability under a newly recognized legal standard violates the federal Constitution. This was one of the issues regarding the constitutionality of punitive damages before the Court in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. ____, 106 S. Ct. 1580 (1986), which was not resolved. The Court noted, however, that the issue was an "important issue[ ] which, in an appropriate setting, must be resolved." *Id.* at 1589. Subsequently, the Court noted probable jurisdiction in

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11 *See* Grass, *The Penal Dimensions of Punitive Damages*, 12 Hastings Const. L.Q. 241 (1985), for an extended analysis of the application of the *Mendoza-Martinez* factors to punitive damages.

*Bankers Life & Cas. Co. v. Crenshaw*, Docket No. 85-1765, which also raises this issue. Given the other questions presented in *Bankers Life*, however, the Court may not have occasion to reach the issue. The instant case, by contrast, presents the issue cleanly. It affords the "appropriate setting" for addressing this important constitutional question.

## II.

## WHETHER A LITIGANT SUBJECTED ON APPEAL TO A NEWLY CREATED LEGAL DUTY IS CONSTITUTIONALLY ENTITLED TO A NEW TRIAL AS TO WHETHER IT MET ITS NEW DUTY AND, IF IT DID NOT, WHETHER IT SHOULD BE SUBJECTED TO PUNITIVE DAMAGES FOR ITS EARLIER FAILURE TO HAVE MET THAT DUTY.

A second issue concerns the right of a litigant, first subjected on appeal to a newly created legal duty, to remand and retrial under appropriate instructions. In this case, the Idaho Supreme Court held for the first time that a component manufacturer had a duty to warn ultimate consumers of the risks associated with use of the product. Differing with the trial court, the Idaho Supreme Court also ruled that a component manufacturer would be able to discharge its duty to warn through an intermediary, provided that reliance on the intermediary were "reasonable." Appendix 7a-9a.

It is undisputed that Alcoa had in fact warned bottlers that injuries could result if aluminum caps were improperly applied. The Idaho Supreme Court nevertheless concluded that there was sufficient evidence from which the jury "could have found" that Alcoa's warnings to bottlers were inadequate. In fact, however, the jury made no such finding. Nor could it, for it was not instructed that Alcoa could discharge its duty by issuing warnings to an intermediary. Thus, the jury had no occasion to consider or decide whether Alcoa's warnings to bottlers were in fact adequate

or, if not, whether Alcoa should be subjected to punitive as well as compensatory damages. Despite the absence of any jury finding on this crucial issue, the Idaho Supreme Court inexplicably refused to remand the case for retrial under appropriate instructions.

Under the Due Process Clause of the Fourteenth Amendment, deprivation of property requires an appropriate hearing. As was stated in *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), "[t]his Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest." *Accord Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). The precise configuration of the required opportunity to be heard varies with context, but in every case it must be meaningful. This essential proposition was neatly summarized in *Mathews*, where the Court declared that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)." 424 U.S. at 333.

Obviously, a meaningful opportunity to be heard requires timely and effective notice. As this Court has said, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Equally obviously, notice and a meaningful opportunity to be heard are effectively denied when a defendant is held liable on appeal on a theory not presented to the trier of fact. When a crucial issue is not submitted to the trier of fact, the opportunity to be heard on *other* issues becomes meaningless. For that reason, basic fairness requires that judgments be based not on what a jury "*could* have found," but on what the jury actually did find. For an appellate court to affirm an adverse judgment based on what

the jury "*could* have found" when no such finding was actually made is to deny that meaningful opportunity to be heard which is the first essential of due process of law.

That is precisely the effect of the decision in the court below. The judgment against Alcoa was affirmed despite the fact that, under applicable law, Alcoa was entitled to judgment in its favor if it gave reasonable warnings through its intermediaries and despite the fact that this issue was never presented to the trier of fact. It is just as if the Idaho Supreme Court entered judgment without trial. The result is a deprivation of property without a meaningful opportunity to be heard.

That this disposition is no mere contravention of state law, but is instead a recognized violation of federal due process, is made abundantly clear by *Saunders v. Shaw*, 244 U.S. 317 (1917). In that case, a state supreme court entered judgment against the defendant on the basis of a factual proposition that the trial court had regarded as immaterial. Given the trial court's view of the case, the defendant had neither reason nor opportunity to introduce evidence on the issue at trial. Speaking for a unanimous Court, Mr. Justice Holmes concluded that the subsequent decision of the appellate court, based as it was on a determination that the defendant had no proper opportunity to contest, violated the Due Process Clause of the Fourteenth Amendment. As Justice Holmes pointed out, it might be true that the same result would obtain after remand and retrial, "but we . . . cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." *Id.* at 319. *Accord Georgia Railway & Electric Co. v. Decatur*, 295 U.S. 165, 171 (1935).

In short, due process clearly requires that after a litigant is subjected to a newly created legal duty, it be afforded an opportunity to be heard on whether it met the newly enunciated standard (and therefore had no liability to plaintiff) and, if it did not, whether it should be punished for its failure to have done so. This issue is of growing

importance as courts have shown an increasing willingness to embrace new theories of manufacturers' liability.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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# Opinion of the Supreme Court of the State of Idaho

1986 Opinion No. 152

IN THE

SUPREME COURT OF THE STATE OF IDAHO

NO. 15883

Boise May 1986 Term
FILED: November 24, 1986
FREDERICK C. LYON, Clerk

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DAVID SLIMAN and CAROLYN SLIMAN, husband and wife,

*Plaintiffs/Respondents/*
*Cross-Appellants,*

—v.—

ALUMINUM COMPANY OF AMERICA,
a Pennsylvania corporation,

*Defendant/Appellant/*
*Cross-Respondent,*

—and—

SEVEN-UP U.S.A., a Missouri corporation; NOEL CANNING CORPORATION, a foreign corporation; 7-UP BOTTLING COMPANY OF TWIN FALLS, IDAHO, an Idaho corporation; SAFEWAY STORES INCORPORATED, a Maryland corporation,

*Defendants.*

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Appeal from the District Court of the fifth Judicial District for the State of Idaho, Twin Falls County. The Honorable Daniel B. Meehl, District Judge.

Appeal from a district court judgment finding in favor of the plaintiffs and awarding punitive damages. *Affirmed.*

Louis F. Racine, Jr., of the firm Racine, Olson, Nye, Cooper & Budge, Pocatello, and Larry D. Ottaway and

G. David Ross, of the firm Foliart, Huff, Ottaway & Caldwell, Oklahoma City, Oklahoma, attorneys for appellant/cross-respondent. Mr. Racine and Mr. Ottaway argued.

Wilbur T. Nelson, of the firm Nelson, Westberg & McCabe, Chartered, Boise, and Joseph M. Imhoff, Jr., of the firm Imhoff & Lynch, Boise, attorneys for respondents/cross-appellants. Mr. Nelson argued.

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BISTLINE, J.

Plaintiff Carolyn Sliman suffered complete loss of sight in her left eye as a result of an aluminum twist-off cap having forcibly ejected from a 7-Up soft drink bottle. Plaintiffs sued the defendant-appellant Aluminum Company of America (ALCOA), Seven-Up U.S.A. Inc., Noel Canning (Seven-Up U.S.A.'s bottler), and various other defendants. After trial a jury found plaintiff Carolyn Sliman 25 percent at fault, defendant Seven-Up U.S.A. 45 percent at fault, ALCOA 30 percent at fault, and apportioned no fault to the rest of the defendants. The jury found the plaintiffs' damages to amount to $100,000 and further assessed punitive damages against defendant Seven-Up U.S.A. of $200,000 and against ALCOA $100,000. ALCOA appeals from that judgment. *We affirm.*

## I. BACKGROUND

On October 9, 1979 Carolyn Sliman prepared to open a two-liter plastic bottle of 7-Up. The bottle was capped with an aluminum twist-off closure with an aluminum band around its bottom known as a "pilfer-proof band." Neither the cap nor the bottle bore any warnings concerning the cap blowing off, or any instructions of how to remove the cap. Believing that the pilfer-proof band must be removed before removing the twist-off cap itself, she pulled at the band with a pair of pliers. At this point, the cap exploded from the bottle and struck her in the left eye. The impact caused permanent injury including the complete loss of sight in her eye.

Plaintiffs recount the following facts developed at trial:

1. ALCOA designed and presented to the industry the system for closure of soft drink bottles with aluminum caps.

2. ALCOA designed, patented, and marketed the closure involved in the instant accident, known as a "top side pilferproof closure."

3. From the beginning of its design, manufacture, and marketing of the caps, ALCOA recognized a potential for forceful blow-off.

4. ALCOA increased the manufacture and marketing of these caps and of machines to apply the caps from 1967 to the date of the accident in 1979 despite receiving notification (generally by claims or lawsuits) of 229 injuries to consumers due to blow-offs of these caps. ALCOA was aware that the rate of injuries to consumers increased in proportion to the number of closures sold. ALCOA further was aware that the forceful blow-off of closures could occur for a variety of reasons, including misapplication of its caps by the bottlers, mishandling by consumers, and so-called "tail-end blow-offs" which could occur after usual and customary handling by consumers. ALCOA knew that premature blow-offs could never be entirely eliminated.

5. During the period from 1967-79, ALCOA made only one change in its specifications for threads on the manufactured bottles (called the "bottle finish"). This change did not reduce incidents of blow-offs or injuries to consumers.

6. From 1967 to 1979, ALCOA took no action to warn consumers or to recommend or require that soft drink franchisers or bottlers who purchased its product do so. Nor had ALCOA effectively modified its product or restricted or terminated its marketing.

7. As early as 1973 ALCOA's senior packaging engineer was aware of a proposed bottle finish which might prevent premature blow-off by use of vertical slots to safely vent carbon dioxide gas pressure before the cap was released. Nevertheless,

ALCOA made no effort prior to the date of the accident to implement such a change in the bottle finish, even though plastic bottles of the type involved in this case were amenable to the new bottle finish and had been in use for at least two years prior to the accident.

ALCOA presents an additional set of facts:

1. At the time the cap left the possession of ALCOA, it was a cylindrical shell without threads and without defect.

2. The bottler applies the unthreaded shell to the bottle with a capping machine that creates a seal and a fit.

3. When the shell is properly applied, in the manner recommended by Seven-Up U.S.A. and ALCOA, the product can be opened safely.

4. In this case, there was no defect in the shell or other components of the soft drink package until Carolyn Sliman applied pliers to the cap.

5. In its agreement with its bottling companies, Seven-Up U.S.A. has strict and absolute control over all package shapes, components, labels, and graphics.

6. ALCOA never had possession or control of the beverage, bottle, or final soft drink package involved in the instant accident. Nor did ALCOA have any right or opportunity to direct the assembly or manufacturing process.

7. Prior to the instant accident, ALCOA advised Seven-Up U.S.A. and its bottling company that personal injury could result if a closure was improperly applied.

On appeal, ALCOA raises three issues which we now address.

## II.

ALCOA initially contends that the case should not have been submitted to the jury, because ALCOA had no duty to warn Carolyn Sliman. Writing for a unanimous Court, Justice Bakes comprehensively discussed the standard of review appropriate to this issue:

> Our task on appeal from a jury verdict is to determine if there was substantial, competent evidence to support the verdict. . . . The substantial evidence test also applies to an appeal from a denial of a motion for judgment n.o.v. . . . In reviewing the evidence, we must view it in a light most favorable to the respondent. . . . Only when the findings of the trier of fact are clearly erroneous will the verdict be set aside. . . . A finding of the trier of fact will be set aside only if there is no substantial evidence to support it.
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> Spanbauer v. J.R. Simplot Co., 107 Idaho 42, 44, 685 P.2d 271, 273 (1984) (citations omitted).

In the context of both negligence and strict liability, a supplier in some situations has the duty to warn of risks from its products. In an action based on negligence, this Court has held:

> As a general rule, if any supplier, including the distributor, of a product knows or has reason to know that the product is likely to be unsafe when used for the purpose for which it is supplied, and has no reason to believe that the persons for whose use the product was supplied will realize its unsafe condition, then the supplier has a duty to exercise reasonable care adequately to warn them of the unsafe condition or of the facts which make the product likely to be dangerous.
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> Robinson v. Williamsen Idaho Equipment Co., 94 Idaho 819, 825, 498 P.2d 1292, 1298 (1973) (*citing Restatement (Second) of Torts* §§ 388, 497) (footnote omitted).

This duty exists only where the manufacturer "knows or has reason to know the unsafe condition of the product when used for the purpose for which it was supplied." *Id.* at 826, 498 P.2d at 1299. The manufacturer is not absolved of its duty to warn if "the product might prove unsafe only to a few, foreseeable users." *Id.* "Even though a product is not inherently defective

in design or manufacture, the supplier's duty to warn extends to risks of danger which arise during the known or foreseeable use of the product." *Id.* at 826-27, 498 P.2d at 1299-1300.

In the context of strict liability, "where the defendant has 'reason to anticipate that danger may result from a particular use' of his product and he fails to give adequate warnings of such a danger, 'a product sold without such warning is in a defective condition.' " Rindlisbaker v. Wilson, 95 Idaho 752, 759, 519 P.2d 421, 428 (1974) (quoting Restatement (Second) of Torts § 402A comment h). As is apparent, there generally is little difference in the requirements and analysis of the duty to warn under either a negligence or strict liability theory, both of which the plaintiffs advanced. *See* Feldman v. Lederle Laboratories, 479 A.2d 374, 386 (N.J. 1984) and cases cited therein; *see generally*, J. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss.L.J. 825, 842 (1973).[1]

ALCOA contends that it had no duty to warn the ultimate purchaser of its product of the danger of the cap's blow-off. ALCOA bases its contention on two grounds. First, as the manufacturer of a component part in the ultimate product, ALCOA had no effective means to communicate such a warning directly to the ultimate purchaser. ALCOA did issue certain warnings concerning misapplication to the manufacturer, Seven-Up U.S.A., and to the bottler. Accordingly, argues ALCOA, the duty to warn rested exclusively with Seven-Up U.S.A., which controlled the labeling and which chose not to warn of blow-offs. Second, ALCOA had no duty to warn of risks which were not reasonably foreseeable. In ALCOA's view, Carolyn Sliman's manner of removing the cap was not reasonably foreseeable. We will address each of these grounds in turn.

The question of when a manufacturer of a component part has the duty to warn of risks associated with it is one of first

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1 One exception would be where the seller reasonably knew of a danger but failed to communicate a warning at all. In such a case the seller would be strictly liable even though the plaintiff could not establish that the failure resulted from negligence. *See* Restatement (Second) of Torts § 402A comment j (1965), *cited in Rindlisbaker*, *supra*, 95 Idaho at 759, 519 P.2d at 428.

impression before this Court. However, we take guidance from the recent decision of the Supreme Court of Texas, which addressed a similar question involving the same defendant in Alm v. Aluminum Company of America, Supreme Ct. No. C-4093 (Texas, July 2, 1986). Generally speaking, in some circumstances a supplier positioned on the commercial chain remote from the ultimate consumer may fulfill its duty to warn by adequately warning an intermediary. The *Alm* court noted two such circumstances, the first being "when a drug manufacturer properly warns a prescribing physician of the dangerous propensities of its product . . . . The doctor stands as a learned intermediary between the manufacturer and the ultimate consumer. Generally, only the doctor could understand the propensities and dangers involved in the use of a given drug." *Id.*, slip op. at 5-6. The second circumstance involves "a bulk supplier, one who sells a product to another manufacturer or distributor who in turn packages and sells the product to the public . . . ." *Id.* at 6. Because of its remote position and its lack of control over the labeling and marketing of the ultimate product, a component part manufacturer also should be able to issue warnings through an intermediary. *Id.*

However, as succinctly observed the *Alm* court, in every circumstance the reliance on the intermediary must be *reasonable. Id.*; *see also Restatement (Second) of Torts* § 388 ("One who supplies directly or through a third person" must "exercise reasonable care to inform [the ultimate user] of [a chattel's] dangerous condition or of the facts which make it likely to be dangerous."), *adopted in Robinson, supra*, 94 Idaho at 825, n.14, 498 P.2d at 1298 n.14.[2] Manufacturers, including those of

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2 The dissent concludes that "the majority's reliance on § 388 of the Restatement (Second) of Torts is misplaced." The only basis the dissent provides for this conclusion is caveat (2) to § 402A. What the dissent fails to recognize is that the Slimans' action sounded in negligence as well as strict liability. As explained above, the analysis under strict liability theory is basically the same as under the negligence theory. Section 388 controls in the case of allegations of negligent failure to warn, whether the seller supplies to the purchaser directly or through a third party. This Court adopted § 388 in *Robinson, supra*, a unanimous decision in which Justices Shepard and McFadden joined. *See also* 1A L. Frumer and M. Friedman, *Products*

component parts, may not "rely *unquestioningly* on others to sound hue and cry concerning a danger in its product." Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1090 (5th

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*Liability* § 8.03[3] (citing § 388 and consistent case law as the "better and more modern view . . . ."). Accordingly, § 388 controls here. The caveat to § 402A obviously has no application to § 388 or to Sliman's negligence claim.

In any event, the dissent further omits the caveat to the caveat, found in § 402A comment p: "It seems reasonably clear that the mere fact that the product is to undergo processing, or other substantial change, will not in all cases relieve the seller of liability under the rule stated in this section." The only reason the Institute held back was the dearth of case law on the subject in 1965.

Clearly, the better rule, as well-established in post-1965 case law, is to absolve suppliers to intermediaries of their duty to warn only where their reliance on the intermediaries is reasonable. As Restatement comment p (on which the dissent relies) states: "No doubt there will be some situations, and some defects, as to which the responsibility will be shifted, and others in which it will not." Where there is evidence as there is here, that (1) a component part manufacturer knows of a danger, related to its product and (2) knows the intermediary is not issuing a warning of that danger, but fails (1) to suggest to the intermediary that a warning to the consumer is needed, or (2) to attempt to communicate a direct warning, even though in such circumstances warnings through media were customary in the consumer product industry, Tr., p. 108, then the manufacturer should bear the responsibility the jury assigns to it. This "better and more modern view" contrasts with the total, unreasoned, and indiscriminant immunity which the dissent and certain of its authority would grant manufacturers who sell to intermediaries. 1A *Products Liability* § 8.03[3]; *see also* cases cited above at pp. 7-8; and cases cited in *Alm*, *supra*, slip op., pp. 5-7. It also has constituted the law of Idaho since this Court adopted Restatement § 388 in *Robinson*.

The dissent recites holdings contravening this view of a number of cases without showing their factual circumstances to resemble ours, and without showing any persuasive rationale. The dissent then takes issue with the *Alm* decision, finding the reasoning of dissenting Justice Gonzalez more persuasive. That "reasoning" quoted in the dissent is no more than an unsupported conclusion that a warning to an intermediary ought to insulate a manufacturer from liability. Such a broad-brush approach disregards whether or not the manufacturer was justified in relying on the intermediary, and whether or not the manufacturer could have asked or negotiated for a warning or communicated one directly to the consumer. The Texas Court, behind the well-reasoned and well-documented opinion of Justice Kilgarlin, rejected this approach, as does this Court.

Cir. 1973) *cert. denied* 419 U.S. 869 (1974) (emphasis added). As the Restatement notes:

> Giving to the third person through whom the chattel is supplied all the information necessary to its safe use is not in all cases sufficient to relieve the supplier from liability. It is merely a means by which this information is to be conveyed to those who are to use the chattel. *The question remains whether this method gives a reasonable assurance that the information will reach those whose safety depends upon their having it.*
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> Restatement (Second) of Torts § 388, comment n (emphasis added); *see also*, *Borel*, *supra*, 493 F.2d at 1091 ("The seller's warning must be reasonably calculated to reach [the ultimate consumer] and the presence of an intermediate party will not by itself relieve the seller of this duty.").

As the United States Court of Appeals for the Eighth Circuit observed:

> When a manufacturer can reasonably foresee that the warnings it gives to a purchaser of its product will not be adequately conveyed to probable users of the product, then its duty to warn may extend beyond the purchaser to those persons foreseeably endangered by the product's use. Warnings given to the purchaser do not necessarily insulate the manufacturer from liability to injured users of the product. Restatement (Second) of Torts § 388 & Comment n (1965); L. Frumer & M. Friedman, 1 *Products Liability* § 803[3] (1980).
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> Hopkins v. Chip-in-Saw, Inc., 630 F.2d 616, 619 (8th Cir. 1980); *accord*, Seibel v. Symons Corp., 221 N.W.2d 50, 55 (N.D. 1974).

Naturally, the factual question of what is "reasonable assurance" is for the jury to determine.

In addition, the component manufacturer must give an *adequate* warning. *Alm*, *supra*, slip op. at 7; *see also*, *e.g.*,

Woodill v. Parke Davis & Co., 402 N.E.2d 194, 199 (Ill. 1980). As with the reasonableness of assurance that an intermediary will convey a warning, the adequacy of the warning given the intermediary is for the jury to determine. Bryant v. Technical Research Co., 654 F.2d 1337, 1345 (9th Cir. 1981) (interpreting Idaho law); *Alm*, *supra*, slip op. at 7; Oak Grove Investors v. Bell & Gossett Co., 668 P.2d 1075, 1080 (Nev. 1983).

Regarding both of the above factual questions, the record clearly contains substantial competent evidence to support the verdict. Substantial competent evidence was introduced which indicated that ALCOA not only *knew* that Seven-Up U.S.A. and other intermediaries had failed to include warnings to consumers of the dangers of blow-offs, but also that ALCOA had *not suggested* that the intermediaries include such warnings. Based on this evidence, the jury readily could have found that ALCOA lacked reasonable assurance that the warning would reach the consumer. *Accord*, *Hopkins*, *supra*; *Seibel*, *supra*.[3]

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3 The fact that ALCOA lacked control over the finished product does not as a matter of law absolve it of its duty to warn. *Hopkins*, *supra*, 630 F.2d at 619; *Alm*, *supra*, slip op. at 5-7; *Seibel*, *supra*, 221 N.W.2d at 55. ALCOA could have suggested and even insisted on a warning by the intermediaries. In addition, ALCOA could have communicated a warning through national media. The Slimans' expert Greene testified that in such circumstances warnings through advertisements were customary in the consumer product industry. R., p. 108. The Restatement observes:

> If, however, the third person is known to be careless or inconsiderate or if the purpose for which the chattel is to be used is to his advantage and knowledge of the true character of the chattel is likely to prevent its being used and so to deprive him of this advantage—as when goods so defective as to be unsalable are sold by a wholesaler to a retailer—the supplier of the chattel has reason to expect, or at least suspect, that the information will fail to reach those who are to use the chattel and whose safety depends upon their knowledge of its true character. *In such a case, the supplier may well be required to go further than to tell such a third person of the dangerous character of the article, or, if he fails to do so, to take the risk of being subjected to liability if the information is not brought home to those whom the supplier should expect to use the chattel.* In many cases the burden of doing so is slight, as when the chattel is to be used in the presence or vicinity of the

Substantial competent evidence also was introduced that ALCOA knew that consumers' use of tools on the caps could and had resulted in blow-offs, *but that ALCOA's warnings to intermediaries omitted this particular risk.* Based on this evidence, the jury could have found that ALCOA had failed to give adequate warnings. *Accord, Alm, supra,* slip op. at 10.

ALCOA alternatively asserts that the manner in which Carolyn Sliman attempted to open the soft drink—characterized by ALCOA as a "misuse" of the product—was so unforeseeable that ALCOA had no duty to warn of the risks involved. As is well established, a supplier has no duty to warn where the use made of a product was not known or reasonably foreseeable to the manufacturer or seller. *Robinson, supra,* 94 Idaho at 826-27, 498 P.2d at 1299-1300; *see generally* 1A L. Frumer and M. Friedman, *Products Liability* § 8.03 (hereinafter *Products Liability*). The factual question of foreseeability is for the jury to determine. 1A *Products Liability, supra,* § 8.03[1] ("This being an area in which judges find it difficult to agree, the issue should ordinarily be left to the common sense of the jury.") (*see* cases cited therein). In this case, substantial competent evidence was introduced that ALCOA not only foresaw but had actual knowledge of consumers' using tools to remove caps. The jury readily could have found that ALCOA could have foreseen Carolyn Sliman's actions.[4]

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person supplying it, so that he could easily give a personal warning to those who are to use the chattel. *Even though the supplier has no practicable opportunity to give this information directly and in person to those who are to use the chattel or share in its use, it is not unreasonable to require him to make good any harm which is caused by his using so unreliable a method of giving the information which is obviously necessary to make the chattel safe for those who use it and those in the vicinity of its use.*

Restatement (Second) of Torts § 388, comment n (emphasis added).

4 The dissent erroneously asserts that "[t]he record reflects that ALCOA had no knowledge of this type of incident . . . ." From this the dissent concludes that ALCOA could not have foreseen the manner in which Sliman opened the bottle. The dissent overlooked the testimony of ALCOA's

In sum, there being substantial competent evidence to support the jury's findings and the verdict, they will not be set aside. *Spanbauer, supra*, 107 Idaho at 44, 685 P.2d at 273.

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senior packaging engineer. He testified that not only did he foresee the use of tools to remove the caps, but also that "I've observed tools, pliers [the tool used by Sliman], rubber pads, towels, used for turning the closure . . . ." Tr., p. 463. He further testified that such use of tools "could produce the expulsion of the closure." Tr., p. 464. And he testified that "we might have had claims which involved pliers or crescent wrenches, Channel Loks, Vise-Grips, it's surprising the number of various implements that we've seen, that people do sometimes try to use." Tr., pp. 464-65. He later admitted that the engineering department "had seen some" blow-offs caused by the use of tools. Tr., p. 465.

The dissent also selectively reads the testimony from the Sliman's expert, Mr. Greene. In fact, the dissent goes so far as to omit portions of Greene's testimony without the proper use of elipses. He testified that he personally had worked on "20 or more cases . . . [where] people were using tools to open the container, and that's another very common thing." Tr., p. 70. ALCOA was involved in at least four of these cases prior to 1979. Tr., p. 86. Greene noted that when the cap's threads are shallow, "many times a person has to go get a pliers to remove it . . . ." Tr., p. 72.

The testimony under cross-examination which the dissent cites reads as follows:

> Q. Do you know of any other situation, other than this, where someone was injured, or a cap was actually torn causing the cap to blow off?
>
> A. *Well, I'm sorry, I confused your question. Many times a tool is used to open it, but where the tearing is exactly like this tearing, I don't know of another case.*
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> Tr., pp. 116 (emphasis added).

The dissent overlooks Greene's all-important qualification that he knew of "many" accidents involving tools, though not accidents "exactly like this."

If the dissent finds some significance in slight variations among details of accidents involving tools, then the dissent is splitting hairs. Of course such accidents will vary in their "exact" detail. Greene testified that "many times people damage the cap [with tools] when they're trying to use that to open it, a very common, foreseeable situation that happens on many occasions." Tr., p. 75. It matters little that the "exact" damage varied from one accident to the next. The key point is that ALCOA could have foreseen, and in fact even knew of and was involved in accidents involving tools. The instructions and warnings necessitated by such accidents are the same for all such accidents.

Unquestionably, substantial competent evidence showed that ALCOA could have foreseen and even knew of accidents involving tools. Excerpts of the testimony of Greene and ALCOA's engineer are attached.

III.

ALCOA next asserts that the district court erred in admitting into evidence a list of 229 claims involving "blow-off" accidents of which ALCOA was familiar prior to the instant accident. Chief Justice Donaldson recently set out the appropriate standard of review as follows:

> *Decisions regarding the inclusion or exclusion of evidence are within the sound discretion of the trial court and will not be upset on appeal absent a showing that the trial court abused its discretion. See, e.g., Rosenberg v. Toetly*, 94 Idaho 413, 489 P.2d 446 (1971). Evidence of other accidents may be admissible to prove the existence of a particular physical condition or defect, the risk created by a defendant's conduct, that the defect cause the alleged injury, or that a defendant had notice of the danger. McCormick on Evidence, § 200 (3rd Ed. 1984). *Evidence of other accidents may be excluded if the trial court decides* that the evidence would unfairly prejudice the opposing party, *that the other accidents are not substantially similar to the subject case*, or that admission will raise collateral issues or confuse the jurors. *Id.*
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> Fish Breeders of Idaho, Inc. v. Rangen, Inc., 108 Idaho 379, 382, 700 P.2d 1, 4 (1985) (emphasis added).

The evidence clearly was relevant to whether or not the "defendant had notice of the danger," *id.*, which in turn was material to whether ALCOA had sufficient knowledge of the risk to require a warning, *e.g.*, Gillham v. Admiral Corp., 523 F.2d 102, 109 (6th Cir. 1975); *see generally*, 1A *Products Liability*, *supra*, § 12.01[2] ("[E]vidence of prior accidents involving the same product under similar circumstances is admissible to show notice to the defendant of the danger."), and to whether punitive damages were warranted. *See* Cheney v. Palos Verdes Investment Corp., 104 Idaho 897, 905, 665

P.2d 661, 669 (1983) ("An award of punitive damages will be sustained on appeal only when it is shown that the defendant acted in a manner that was 'an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences.' *Hatfield v. Max Rouse & Sons Northwest*, *supra*, 100 Idaho at 851, 606 P.2d at 955. *See Linscott*, *supra*.") ALCOA's principle contention is that the prior accidents were so different from the instant one that the district court abused its discretion in admitting the evidence of prior accidents.[5] We find no merit to this contention.

As indicated in *Fish Breeders*, *supra*, the prior accidents only need be "substantially similar" to the instant one, not identical in every detail. 108 Idaho at 382, 700 P.2d at 4; *see also* Cogswell v. C.C. Anderson Stores Co., 68 Idaho 205, 215-16, 192 P.2d 383, 389 (1948); *see generally* 1A *Products Liability*, *supra*, § 12.01[2]. The listed prior accidents all involved the forcible ejection of 28 millimeter roll-on aluminum caps, as in the instant accident. Most of the accidents involved injuries to the eyes, as in the instant case. The precise causes of the blow-offs varied; however, in the context of the plaintiffs' allegations of failure to warn, this variation is of little consequence. Regardless of the *cause* of the blow-offs, the fact remains that they did occur in the prior accidents just as in the instant accident. The warnings and instructions necessitated by knowledge of this danger would be the same. In short, we cannot say that the district court abused its discretion in admitting the evidence of prior accidents. *Fish Breeders*, *supra*, 108 Idaho at 382, 700 P.2d at 4.

IV.

Finally, ALCOA argues that the district court erred in submitting the issue of punitive damages to the jury. This

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5 ALCOA claims it never denied knowledge of the danger, and thus the evidence of the prior accidents was irrelevant. However, ALCOA fails to identify in the record any affirmative measures to admit or publish.

Court recently set out the appropriate standard of review as follows:

> Punitive damages are "not favored in the law and therefore should be awarded only in the most unusual and compelling circumstances." Cheney v. Palos Verdes Investment Corp., 104 Idaho 897, 904-05, 665 P.2d 661, 668-69 (1983). The policy behind such damages is deterrence rather than punishment. *Id.* at 905, 665 P.2d at 669. "An award of punitive damages will be sustained on appeal only when it is shown that the defendant acted in a manner that was 'an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences.' " *Id.* (Citation omitted.) "The justification for punitive damages must be that the defendant acted with an extremely harmful state of mind, whether that state be termed 'malice, oppression, fraud, or gross negligence.' " *Id.*, *quoting* Morrison v. Quality Produce, Inc., 92 Idaho 448, 450, 444 P.2d 409, 411 (1968).
>
> *The decision of whether to submit the question of punitive damages to the trier of fact rests within the discretion of the trial court.* [Citations omitted.]
>
> Soria v. Sierra Pacific Airlines, Inc., __ Idaho __, __ P.2d __, slip op. at 29-30 (Sup. Ct. No. 15817, issued Aug. 26, 1986) (emphasis added).

In part, ALCOA bases its argument on the premise that the admission of the evidence indicating ALCOA's knowledge of prior accidents was error. However, as just explained, we find no error in admitting that evidence.

Neither do we find error in the admission of the following testimony of plaintiffs' expert witness George Greene:

> Q. (By Mr. Nelson) . . . Do you have an opinion as to whether the conduct of Alcoa and 7-Up U.S.A. was an extreme deviation from customary and usual action taken by manufacturers of consumer products?

A. (By Mr. Green) I do.

. . . . [Objections by counsel omitted.]

Q. What is your opinion in that regard?

. . . .

A. It's my opinion that the failure to correct this problem, or to warn, at least warn the public about it, is an extreme deviation from the customary practice in the industry.

Tr., pp. 108-10.

ALCOA's objection is based on the archaic notion that experts may not offer opinions on matters of ultimate fact. This is not the law of Idaho. In Idaho, experts may testify to ultimate issues or facts so long as their testimony assists the trier of fact. *See* Davis v. Nelson-Deppe, Inc., 91 Idaho 463, 469, 424 P.2d 733, 739 (1967); *see generally*, *Comments to the Idaho Rules of Evidence* (1985), comment to Rule 704, p. 3.[6] The determination of what will be of assistance to the trier of fact lies within the broad discretion of the trial court. Brown v. Jerry's Welding and Construction Co., 104 Idaho 893, 897, 665 P.2d 657, 661 (1983). The record affords evidence that Mr. Greene was a qualified safety engineer and was familiar with customary practices in the consumer products industry.[7] His testimony as to ALCOA's "extreme deviation" from these customary practices was relevant to the issue of punitive damages. *Soria*,

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6 Rule 704 became effective along with the rest of the new Idaho Rules of Evidence on July 1, 1985, after the date of the instant trial. However, as the Evidence Committee noted, Rule 704 is consistent with prior Idaho law. *Id.*

7 Contrary to ALCOA's argument, the rules of evidence do not require an expert to testify only to the standard particular branch of industry in which the defendant operates (here the bottling industry as a branch of the consumer products industry); nor do they require that the expert articulate a standard at all. Certainly the adverse party may argue that these factors make the witness's testimony of no assistance, and may explore through cross-examination the witness's basis for opinion, but the district court retains the discretion to permit the opinion testimony based on its view of the "assistance" value of the testimony.

*supra*, slip op. at 30. Mr. Greene's learned opinion arguably assisted the less knowledgeable triers of fact in determining whether ALCOA acted in extreme deviation from reasonable standards of conduct. Accordingly, the district court did not abuse its discretion in permitting this testimony.

With this evidence of ALCOA's "extreme deviation," of ALCOA's long-standing knowledge of the prior accidents, and of ALCOA's failure to insure that consumers were warned of the risk of which it was aware for so long, the record supports the jury's finding that ALCOA "show[ed] a reckless disregard for plaintiff's safety and an extreme deviation from standards of reasonable conduct." R., Vol. 5, p. 358 (special verdict).[8]

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8 In addition, ALCOA's senior packaging engineer knew of a feasible and safer alternative design from 1973 on, but ALCOA failed to modify its design to alleviate the risk. While this evidence is not directly relevant to punitive damages flowing from ALCOA's failure to warn, it demonstrates ALCOA's attitude of remaining aloof from changes which if made in all likelihood would have obviated its duty to warn.

The dissent argues that the district court abused its discretion in submitting the issue of punitive damages to the jury. *See*, *Soria*, *supra*. The dissent claims that the award would have no deterrent effect, because ALCOA could not have implemented a safer design. (The dissent ignores testimony on design changes ALCOA *could have* implemented. Tr., p. 88.) The dissent forgets its own initial observation that this is not a defective design case, but a failure to warn case. Quite clearly, the award of punitive damages acts as a deterrent to inadequate (in fact, absent) warnings.

The dissent also ignores the punitive aspect to punitive damages to which its own authority, Boise Dodge, Inc. v. Clark, 92 Idaho 902, 908, 453 P.2d 551, 557 (1969), alludes.

The dissent's numbers game is disingenuous. As already demonstrated, the number of accidents in which tools were involved was greater than what the dissent is willing to admit. In any event, the total number of blow-offs is what matters, because that number should have led ALCOA to issue or insist on warnings and instructions, which would have protected consumers from *any* manner of blow-off. Further, the number of law suits filed against ALCOA is not the limit to the total number of blow-offs. Expert Greene testified that ALCOA could have foreseen probably "a couple thousand or more of these potential blow-offs for every time that you injure somebody, sir." Tr., p. 86. Such misses are part of the risk considered in safety engineering and risk analysis. Tr., p. 87. Finally, the great numbers of bottles marketed with these caps insured that even with a low rate of blow-offs, such accidents were inevitable without proper instructions and warnings.

The district court did not abuse its discretion in submitting the issue of punitive damages to the jury. *Soria*, *supra*, slip op. at 30; *cf.*, *Gillham*, *supra*, 523 F.2d at 108-09.

V.

The decision of the district court is affirmed. Costs are awarded to respondents, without an award of attorney's fees.

DONALDSON, C.J., and WALTERS, J. (pro tem) concur.

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The dissent also ignores the *magnitude* of the risk. The evidence showed that blow-offs could never be eliminated. *E.g.*, Tr., p. 76. Together with the fact that consumers purchase so many of these bottles, this insured that a certain number of consumers would be injured, many as seriously as was Sliman. Greene testified that proper instructions and warnings would virtually eliminate these injuries. Considering the seriousness of injuries like Ms. Sliman's, the failure to warn appears all the more egregious.

Fantastically, the dissent asserts that no foundation was laid for Greene's testimony. Greene testified on the basis of 15 years' background and experience in the consumer product industry and in the bottling industry. Tr., pp. 64, 107. He had extensively studied the risk of blow-offs from 1973 on. Tr., p. 59. He was familiar with what ALCOA knew and had done concerning blow-offs up to the time of the accident. Tr., pp. 66, 92. He had compared ALCOA's actions with the ordinary and customary standard of care in the consumer product industry. Tr., pp. 83-84. He testified that where so serious a risk cannot be eliminated through design improvement, "[t]he next step is a warning to the user." Tr., p. 91. He testified:

> I've observed that if the condition is known to manufacturers which would cause injury to consumers, in far less numbers than we have in this case, the industry practice is to do something about it, that if you can, you correct it by design, if you cannot correct it by design, you must warn the consumer to protect him.
>
> Tr., p. 107.

In short, he established (1) his knowledge of industry practices and of ALCOA's practices, and (2) that he had compared ALCOA's practices with the industry practices. His conclusion that ALCOA's practices were an extreme deviation from the customary practice was grounded on the soundest of foundations.

All this evidence demonstrates that the district court acted within its discretion in submitting the issue of punitive damages to the jury.

McFADDEN, J. (Pro Tem) dissenting.

It is my conclusion that the plaintiffs failed to state and prove a claim against Alcoa, and further that in any event the trial court erred in submitting to the jury the issue of punitive damages. At the outset it must be pointed out that ultimately the only claim against Alcoa was based on the theory that it had failed to give any warning to the consumer of the potential danger of a bottle cap injuring the consumer when attempting to remove the cap.[1] The issues on this appeal must be considered in light of the fact that Alcoa is only one link in the chain of manufacturing and distributing of a product, *i.e.*, a two-liter bottle of 7-Up. The liabilities of other members of this chain of manufacturing and distribution, that is the bottler, distributor, and retail store, are not before the Court in this appeal.

The majority recognizes that the issue of when a manufacturer of a component part has the duty to warn of risks associated with it is one of first impression before this Court. Relying upon the case of Alm v. Aluminum Company of America, Supreme Court No. C-4093 (Texas, July 2, 1986), to sustain the judgment in this action, the majority holds that the position of Alcoa in contending that the misuse of the product by Mrs. Sliman was not foreseeable, is untenable for such is a factual issue for jury resolution. With this position I disagree, for the reason that considering the multitude of caps manufactured by Alcoa, as compared to the number of incidents of injuries from these caps, it can be said as a matter of law that Alcoa could not foresee the manner in which Mrs. Sliman opened the bottle of 7-Up. The key inquiry is whether the intervening act of Mrs. Sliman is foreseeable. "Ordinarily, the question of foreseeability is a question of fact. . . . However, when the undisputed facts can lead to only one reasonable

---

1 The only theory relied on by the plaintiffs for recovery against Alcoa was a failure to warn of a known danger. The record discloses that the plaintiffs presented no evidence to support recovery on the theory of either a defective product or defective design.

conclusion, the court may rule upon the issue of foreseeability as a matter of law." LeChance v. Ross Machine and Mill Supply, Inc., 102 Idaho 505 at 507, 633 P.2d 570 at 572 (1981).

Part I of the majority opinion upholds the decision of the district court that Alcoa had a duty to warn the ultimate consumer, Mrs. Sliman, even though Alcoa had no prior notice of the specific type of accident she suffered. The majority cites cases such as Robinson v. Williams Idaho Equipment Co., 94 Idaho 219, 498 P.2d 1294 (1973). In this regard I believe the majority erred, because in *Robinson* the Court went on to state:

> If the danger is not obvious or actually known, the warning given must adequately communicate to the user the information in the supplier's possession which is necessary to avoid unsafe use of the product. While the warning need not be the best possible, it must be reasonable under the circumstances, for an inadequate warning is viewed as no warning at all. The reasonableness of the warning, like the reasonableness of conduct in any negligence context, is related to the risk and extent of the foreseeable harm. The protection afforded through the warning must be reasonably coextensive with the danger, in light of the user's experience with the product.
>
> Robinson v. Williamsen Idaho Equipment Co., *supra*, at 827, 1300.

The trial record shows that Alcoa warned the bottlers licensed by Alcoa of the problem created by misapplied caps. No other incident involving the ripping of the threads of the cap with a tool, as occurred here, was shown by the record. The plaintiff's expert, Mr. Greene, even admitted that this was a unique accident:

> Q. At Line 8 you were asked, and I believe this was Mr. Racine, "Q. Have you ever testified in a case where they've attempted to tear off the cap, lid or pilferproof band, either one, with a tool?"
>
> What was your answer there?

A. It was, "No, sir."

Q. Do you know of any other situation, other than this, where someone was injured, or a cap was actually torn causing the cap to blow off?.

A. Well, I'm sorry, I confused your question. Many times a tool is used to open it, but where the tearing is exactly like this tearing, I don't know of another case.

But that's true, generally the tool is used to open the cap, but not necessarily tearing the cap like that.

In fact, the entire record discloses no other prior incidents where someone ripped the threads with a tool. The record reflects that Alcoa had no knowledge of this type of incident, and took the only reasonable step under the circumstances, that of warning its licensed bottlers of the hazards of misapplied caps.

By agreement between Alcoa and the bottlers licensed to use Alcoa's process, once the caps left Alcoa's possession, Alcoa had no control over the labeling, bottling, or distribution of the ultimate product. Alcoa stands in the position of a supplier of a component part. The record discloses that Alcoa supplied the blank caps and that the bottlers filled the bottles and affixed the blank caps by a process developed by Alcoa.[2] It is my conclusion that the majority's reliance on § 388 of the Restatement (Second) of Torts is misplaced. The Restatement (Second) leaves its position on the issue of the responsibility of the supplier of a component part completely open for resolution when:

> [T]he seller sells a product which is not intended to reach the consumer in about the same condition as it left, but is

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2 With Alcoa's process, no threads are present on the cap at all (called a "blank") when the cap is inserted on the bottle after filling. A machine grabs the bottle by a ridge just below the threads on the bottle (called the "finish") and inserts the bottle into a piece called the headset. In the headset, rollers press on the blank and mash the malleable aluminum into the threads of the bottle finish, forming the thread in the cap that holds the cap on the bottle. Tr., p. 78.

> expected to be "processed or otherwise substantially changed" before it reaches him.
>
> Walker v. Stauffer Chemical Corp., 19 Cal.App.3d 671 at 674, 96 Cal.Rptr. 803 at 806 (Cal.D.Ct.App. 1971) (quoting Witkin, Summary of California Law, 1969 Supp. 766 at 768). *See* Restatement (Second) of Torts § 402A caveat (2) and comment p.

Several states have held that no duty to warn the ultimate consumer attaches in such a situation. In Blackburn v. Johnson Chemical Co., Inc., 490 N.Y.S.2d 452, 128 Misc.2d 623 (N.Y.Sup.Ct. 1985), the court held that a manufacturer of a can sold to a company who manufactured an aerosol insecticide which later exploded, had no duty to warn because the company had no control over the labeling or the marketing of the product.

In Shell Oil Co. v. Harrison, 425 So.2d 67 (Fla.D.Ct.App. 1982), the court held Shell had no duty to warn the ultimate consumer. Here, Shell supplied a lawn chemical, Nemagon, to Kerr-McGee who then diluted the substance and marketed it. Shell knew of the dangers and informed Kerr-McGee. Shell had fulfilled its duty because it no longer had any control over the product even though the product was an inherently dangerous substance.

In Hill v. Wilmington Chemical Corp., 156 N.W.2d 898 (Minn. 1968), Shell supplied a solvent to Wilmington, who mixed it with a product of DuPont to make a waterproofing paint. Shell warned Wilmington of the flammability of its product and the enactment of a federal act concerning the labeling of hazardous substances. Since Shell had no control over the labeling, packaging, or manufacture of the end product, the court held that Shell had no duty to warn the ultimate consumer.

In Walker v. Stauffer Chemical Corporation, 19 Cal.App.3d 671, 96 Cal.Rptr. 803 (Cal.D.Ct.App. 1971), Stauffer Chemical was the manufacturer of sulphuric acid which was supplied to a manufacturer of a drain cleaner. The plaintiff was injured when a can of drain cleaner exploded. The court refused to

hold Stauffer liable because the company had no control over the packaging, labeling, or marketing of the drain cleaner.

In Lee v. Butcher Boy, 169 Cal.App.3d 381, 215 Cal.Rptr. 195 (Cal.Ct.App. 1985), the plaintiff was injured by a meat grinder manufactured by Butcher Boy. The plaintiff tried to recover from the manufacturer of the electric motor. The court held that the motor was not defective and the manufacturer had no control over the manfacture of the finished grinder. Therefore, the manufacturer had no duty to warn.

All the cases cited above involve a product that was not defective. Further, the product was incorporated into a finished consumer item over which the defendant had no control in the labeling, manufacturing, and marketing. In the instant case no claim was ever made that the cap was defective in design or manufacture. Alcoa had no control over the labeling, bottling, or marketing of the finished product. Somehow, the majority upholds a duty to warn of the danger of torn threads when such a thing had never happened before, and Alcoa had warned the bottlers of the known danger of misapplication. The majority relies heavily on the recent Texas case of Alm v. Aluminum Company of America, Supreme Court No. C-4093 (Texas, July 2, 1986). I find the reasoning in the dissenting opinion of Justice Gonzalez to be more persuasive in this case:

> Alcoa's position, as a remote manufacturer, is relevant to the duty it owed customers because it affects the extent of Alcoa's duty to warn and its ability to effectively distribute a warning. Significantly, Alcoa is the manufacturer of one product, the capping machine, while J.F.W. is the assembler of the injury producing product, the 7-Up bottle. Alcoa sold the capping machine to J.F.W. whose employees operated and maintained the machine. Alm was injured by a misapplied bottle cap which resulted from allowing the capping machine to get out of adjustment. J.F.W., an intermediate assembler, controlled the entire bottling process.
>
> The mere presence of J.F.W. as an intermediary does not necessarily relieve Alcoa, the original manufacturer,

> of its duty to warn. When the original manufacturer gives a warning to an intermediate manufacturer or assembler, however, it can be relieved of its liability for the intermediary's failure to dissiminate the warning. (citations omitted.) In other words, when a manufacturer proceeds to sell the product anyway, the manufacturer is insulated from liability.
>
> Alm, *supra* (Gonzalez, J. dissenting at p.2).

After reviewing the numerous authorities on this subject, and recognizing the fact that there is a division of authority on the question of the liability of a component part for failure to give warning to the ultimate consumer, I am of the opinion that the line of authority I have cited including the dissent of Justice Gonzalez in *Alm*, is the better rule and should be followed and adopted by this state. I would conclude, therefore, that the manufacturer of a component part, such as Alcoa, which has no control of the labeling, bottling, or distribution of the ultimate product, has no duty as a matter of law to warn the ultimate consumer.

In my opinion the issue of punitive damages' should never have been submitted to the jury. In assessing punitive damages, relevant factors include:

> [T]he prospective deterrent effect of such an award upon persons situated similarly to the defendant, the motives actuating the defendant's conduct, the degree of calculation involved in the defendant's conduct and the extent of the defendant's disregard of the rights of others.
>
> Boise Dodge, Inc. v. Clark, 92 Idaho 902, 908, 453 P.2d 551, 557 (1969).

The award in this case can serve no deterrent effect. In footnote 6 the majority alludes to the Zapata patent as a safer design to alleviate the risks of blow-off. Alcoa's engineer, Bing Welch, testified that Zapata had patented a safer design. He went on to say that Alcoa had no license to use this design and that the bottlers claimed that at the time (prior to October 6, 1979), it was not feasible to produce the new bottle finish

essential for use of this design. He further testified that no design would have held the cap on in this case, as opposed to cases involving misapplication, and that no deviation from standards of the industry, much less an "extreme deviation" occurred simply because there are no standards. Alcoa in no way remained aloof from change which if made in all likelihood would have obviated its duty to warn.

Punitive damages are recoverable in a tort action only when it is shown that the defendant was in an extremely harmful state of mind, whether termed malice, oppression, fraud, gross negligence, or wantoness. Cheney v. Palos Verdes Inn Corp., 104 Idaho 897, 665 P.2d 661 (1983); Yacht Club Sales and Service, Inc. v. First Nat. Bank of North Idaho, 101 Idaho 852, 623 P.2d 464 (1980); Lindscott v. Rainier Nat. Life Ins. Co., 100 Idaho 854, 606 P.2d 958 (1980). That degree of calculation involved in approaching malice, oppression, fraud, or gross negligence simply is not present to justify an award of punitive damages here. In the time period concerned, from 1967 to 1979, 229 claims were known. In any case, whether evidence of the 229 claims against Alcoa is admissible or not, the case put on by the plaintiff shows that during that period roughly 83 billion closures had been marketed. Testimony showed that accidents occurred at the rate of 3-8 accidents per billion closures. An accident such as the one at issue here had happened but once, or one per 83 billion closures. As stated before, Alcoa had taken reasonable and adequate measures to warn the bottlers of the danger of misapplication. To claim Alcoa was wanton and reckless and acted with gross negligence for an occurrence that happened once in the use of 83 billion caps borders on the absurd.

Finally, the plaintiff's expert testimony that Alcoa committed an extreme deviation from consumer industry standards is without merit. No foundation for this statement was ever laid. No industry standards were ever introduced in evidence. Punitive damages are not favored in the law. Certainly this case is not one for such damages. The trial court erred in submitted this issue to the jury.

SHEPARD, J. concurs.

**Judgment of the Supreme Court of the State of Idaho**

IN THE

SUPREME COURT OF THE STATE OF IDAHO

NO. 15883

DAVID SLIMAN and CAROLYN SLIMAN, husband and wife,

*Plaintiffs/Respondents/*
*Cross-Appellants,*

—v.—

ALUMINUM COMPANY OF AMERICA,
a Pennsylvania corporation,

*Defendant/Appellant/*
*Cross-Respondent,*

—and—

SEVEN-UP U.S.A., a Missouri corporation; NOEL CANNING CORPORATION, a foreign corporation; 7-UP BOTTLING COMPANY OF TWIN FALLS, IDAHO, an Idaho corporation; SAFEWAY STORES INCORPORATED, a Maryland corporation,

*Defendants.*

## REMITTITUR

TO: FIFTH JUDICIAL DISTRICT COURT,
COUNTY OF TWIN FALLS.

The Court having announced its Opinion in this cause November 24, 1986, which has now become final; therefore,

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the Opinion, if any action is required; and

IT IS FURTHER ORDERED that, inasmuch as no memorandum of costs on appeal was filed, such costs are hereby waived. No attorney fees awarded on appeal.

DATED this 31st day of December, 1986.

/s/ FREDERICK C. LYON
Clerk of the Supreme Court
STATE OF IDAHO

# Order of the Supreme Court of the State of Idaho Denying Aluminum Company of America's Petition for Rehearing

IN THE

SUPREME COURT OF THE STATE OF IDAHO

NO. 15883

Rehearing No. 86RH-37

DAVID SLIMAN and CAROLYN SLIMAN, husband and wife,

*Plaintiffs/Respondents/*
*Cross-Appellants,*

—v.—

ALUMINUM COMPANY OF AMERICA,
a Pennsylvania corporation,

*Defendant/Appellant/*
*Cross-Respondent,*

—and—

SEVEN-UP U.S.A., a Missouri corporation; NOEL CANNING CORPORATION, a foreign corporation; 7-UP BOTTLING COMPANY OF TWIN FALLS, IDAHO, an Idaho corporation; SAFEWAY STORES INCORPORATED, a Maryland corporation,

*Defendants.*

## ORDER DENYING PETITION FOR REHEARING

The Appellant having filed a PETITION FOR REHEARING and supporting BRIEF on December 15, 1986 of the Court's Opinion released November 24, 1986; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING be, and hereby is, DENIED.

Dated this 31st day of December, 1986.

By Order of the Supreme Court

/s/ FREDERICK C. LYON
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Daniel Meehl
West Publishing
Mead Data Central

**Aluminum Company of America's Petition for Rehearing and Brief in Support of Petition for Rehearing**

IN THE

SUPREME COURT OF THE STATE OF IDAHO

Supreme Court No. 15883
86-ISCR2463

---

DAVID SLIMAN and CAROLYN SLIMAN, husband and wife,

*Plaintiffs/Respondents/*
*Cross-Appellants,*

—v.—

ALUMINUM COMPANY OF AMERICA,
a Pennsylvania corporation,

*Defendant/Appellant/*
*Cross Respondent.*

---

## APPELLANT'S PETITION FOR REHEARING

COMES NOW the Appellant, Aluminum Company of America, and through the undersigned counsel and pursuant to I.A.R. 42 and 44 respectfully requests that the Idaho Supreme Court reconsider and/or re-hear the above entitled matter and that the Court withdraw its prior opinion issued and filed November 24, 1986. This Petition is based upon the points, authorities, and arguments set forth in the accompanying brief in support of Aluminum Company of America's Petition for Rehearing lodged contemporaneously herewith.

DATED this 12 day of December, 1986.

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## CERTIFICATE OF MAILING

This is to certify that on this 12 day of December, 1986, a true and correct copy of the above and foregoing Petition for Rehearing was mailed to:

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IN THE
SUPREME COURT OF THE STATE OF IDAHO
Supreme Court No. 15883
86-ISCR2463

---

DAVID SLIMAN and CAROLYN SLIMAN, husband and wife,
*Plaintiffs/Respondents/Cross-Appellants,*

—v.—

ALUMINUM COMPANY OF AMERICA,
a Pennsylvania corporation,
*Defendant/Appellant/Cross Respondent.*

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# APPELLANT'S BRIEF IN SUPPORT OF PETITION FOR REHEARING

Appeal from the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Twin Falls

THE HONORABLE DANIEL B. MEEHL,
*District Judge, Presiding*

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## INTRODUCTION

In October, 1979, Mrs. Sliman was injured when she ripped the cap from a carbonated soft drink with a pair of pliers. As noted by Justice McFadden, up until her injury approximately 83 billion packages had been opened by consumers without such an incident occurring. Alcoa made reasonable and effective efforts prior to 1979 to advise its customers of the potential for blow-off if its product was misapplied by local bottlers. Everyone conceded that campaign had been communicated to the bottler and its franchiser 7-Up in this case. As a result, the closure was safely and correctly applied when it reached Mrs. Sliman. The jury, after hearing this evidence, found Mrs. Sliman responsible for an "unforeseeable misuse" of the product.

This Court in November, 1986, affirmed a jury verdict against Alcoa for compensatory and exemplary damages by holding as a matter of law that Alcoa breached a newly created duty to warn Mrs. Sliman even though the evidence reflected it had no ability to do so.

By placing upon Alcoa obligations it could not fulfill and requiring it to conform its conduct in 1979 to a standard this Court could not agree on in 1986, the majority created a rule of law which no component part supplier can reasonably satisfy. By ignoring its own language that "factual question[s]" . . . under this new duty are "for the jury to determine," *Sliman* slip opinion at p. 9, the majority denied Alcoa its Constitutional right to have its conduct tried by a jury under proper instruction. For these reasons, Alcoa is compelled to seek rehearing.

## PROPOSITION

## ON REHEARING THE COURT SHOULD REVERSE OR REMAND FOR NEW TRIAL UNDER PROPER INSTRUCTION.

The Court's initial opinion articulates a new standard unique in American jurisprudence. That standard is inequitable and will not serve the ultimate policy of increased product safety. The assessment of damages based on that new standard without a jury finding under proper instruction is wholly arbitrary. Alcoa urges the Court to refine the standard in its initial opinion and adopt a realistic analysis of the component manufacturer's duty to warn, as set out in the proposition below. Such an approach is supported by the great weight of authority and best serves the policy of increasing consumer product safety. In the alternative, a new trial must be granted.

In *Leonard v. Alcoa*, 800 F.2d 523 (5th Cir. 1986), the Fifth Circuit Court of Appeals granted re-hearing in a very similar case, based on the Texas Supreme Court's ruling in *Alm v. Alcoa*, Sp. Ct. No. C-4093 (Texas), July 2, 1986. The Fifth Circuit ordered rehearing based on the Alm court's "new" rule and the fact that the jury below had not been instructed with respect to it. *Id.*

### A. REMAND

Assuming this Court adopts an unprecedented expansion of the component manufacturer's duties, this case must be remanded for trial on the issue of whether Alcoa discharged its obligations under that new rule of law. In its recent opinion granting rehearing in *Leonard v. Alcoa*, *supra.*, the Fifth Circuit Court of Appeals explicitly recognizes the need for jury determination of the adequacy of Alcoa's warnings to its bottler under the *Alm* decision:

> Alcoa's warning was thus evaluated solely on the basis of whether or not it would reach the ultimate consumer; there was no mention of the adequacy of Alcoa's warn-

> ings to or training of Temple Dr. Pepper Bottling. We conclude that the jury's finding that Alcoa did not adequately warn the plaintiff does not encompass the issue of whether Alcoa adequately warned or trained the bottler . . . The Texas Supreme Court's *Alm* decision, however, requires that the jury must be instructed on another issue before liability can be imposed on Alcoa, viz., that Alcoa's warnings to and training of Temple Dr. Pepper Bottling were inadequate . . . In view of the new *Alm* rule and the fact that the jury was not instructed with respect to it, our earlier decision must be vacated, and the case must be reversed and remanded for a new trial. *Id. Leonard v. Alcoa, supra.*, at p. 525

The majority asserts the record contains sufficient evidence to support the verdict regarding the question of the adequacy of Alcoa's warning to 7-Up. However, that question was *not* submitted to the jury. *No* instruction was given which embodied the test now suggested by this Court. The majority states, "the jury readily could have found that Alcoa lacked reasonable assurance that the warning would reach the consumer." Under the instructions given, the jury could not have considered whether Alcoa adequately warned its customer 7-Up under the duties prescribed by this Court. Under these instructions the jury was required to base its verdict solely on a perceived duty of Alcoa to warn Mrs. Sliman. If it had been instructed on the law now formulated by the majority, the jury might have found the warnings given by Alcoa to 7-Up (See, e.g., Tr. 417, 554) gave Alcoa a reasonable basis to rely on that intermediary to make an informed decision on whether to pass along those warnings to consumers. (See, e.g. Tr. 343-4). The majority suggests Alcoa might have warned Mrs. Sliman by 1) insisting that its customers include warnings on labels, and 2) communicating warnings via national media. Imposition of such requirements on the manufacturer of a part which is safe when it leaves the manufacturer's control, undergoes substantial alteration by the intermediary and accounts for less than one percent of the total cost of the finished product is manifestly unfair.

The cases relied on by the majority which impose a duty to warn on a remote manufacturer involve situations where the practicability of giving the warning is apparent.[1] In the present case, conversely, this Court would require extraordinary measures. The Court holds that since Alcoa does not control the labels, it should simply obtain that control by insisting on warnings or take to the national media. A jury must decide the factual issues created by this holding, i.e. the reasonableness of Alcoa's reliance on its customers to warn consumers and the scope of Alcoa's duty to take exceptional measures to put a warning before the public. This is particularly true in light of the relative practicability and ease with which bottlers could convey the warnings suggested by plaintiff's evidence, i.e. a printed warning on the bottle label (Tr. 343-4).

In *Alm v. Alcoa*, *supra.*, on which the majority heavily relies, the Texas Supreme Court remanded for findings on the sufficiency of the evidence of the adequacy of Alcoa's warning to its intermediary (*Id.*, Slip Op. at 12), notwithstanding evidence at trial that the bottler received *no* information regarding blow-off dangers until two weeks prior to trial (*Id.* at 10).[2] In the case at bar, the evidence showed warnings were in fact communicated to 7-Up U.S.A., through both technical memoranda (Tr. at 417) and warnings printed on cartons of Alcoa's product delivered to its bottlers (Tr. at 554). Moreover, Alcoa took substantial steps to apprise the bottling industry in general of blow-off hazards. See appellant's brief, pages 18-20.

Fairness, equity and due process considerations dictate that Alcoa be given a chance to try the issues of the adequacy of its

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1 In *Robinson v. Williamsen Idaho Equipment Co.*, 94 Idaho 819, 498 P.2d. 1292 (1973), the manufacturer dealt directly with the users' agents. The duty to warn could have been discharged by a telephone call. *Id.*, 498 P.2d. at 1297. *Hopkins v. Chip-N-Saw*, 630 F.2d. 616 (8th Cir. 1980), involved a large lumber finishing machine to which a warning could easily be affixed. Moreover, neither case deals with the component part situation at issue here.

2 The Court also refers to Alcoa's failure to warn intermediaries of the risk associated with the use of tools on caps. However, the plaintiff's own evidence specifically negated the necessity of warning the consumer of such risks. See testimony of George Greene, Tr. 117-8.

warnings to bottlers and the "reasonable assurance" that intermediaries would make informed decisions as to which would be communicated to consumers. In discussing whether a supplier's reliance on its intermediary is reasonable, the following factors were mentioned in *Alm*: ". . . whether the distributor is adequately trained, whether the distributor is familiar with the properties of the product and its safe use, and whether the distributor is capable of passing on its knowledge to consumers." *Id.* at 6. These issues should be submitted to a jury under proper instructions. Incomplete instructions coupled with the presence in the record of evidence which could support a verdict for the moving party justifies a new trial. *Anderson v. Gailey*, 97 Idaho 813, 555 P.2d. 144 (1976). In the present case, the jury was not instructed regarding the duty of Alcoa now imposed by the majority, to obtain reasonable assurance that 7-Up U.S.A. would warn consumers. With the evidence in the record, the jury could have found Alcoa satisfied the duty now placed upon it by this Court.

## B. REVERSAL

The initial opinion in this case goes far beyond *Alm v. Alcoa*, Supreme Ct. No. C-4093 (Texas), July 2, 1986, by holding that Alcoa had a duty to warn the ultimate consumer, despite uncontroverted evidence that it adequately warned its customer 7-Up and that 7-Up was in the best position to pass such a warning to the consumer. In *Alm*, *supra.*, the Texas Supreme Court held a component manufacturer satisfies its duty to warn by proving that its intermediary was adequately trained and warned. Where the intermediary is *capable* of passing on adequate warnings given by the component manufacturer, the component manufacturer's duty is "*discharged.*" *Alm v. Alcoa*, slip opinion at pp. 6-7.

It is undisputed that Alcoa began informing bottlers of the consequences of closure misapplication, including the possibility of consumer injury, beginning in 1970 (Tr. 417). A proper application brochure for the 28-millimeter beverage closure was distributed throughout the industry in that year (Tr. 555; Ex. 301). Educational programs were also created to assist in training bottlers in the importance of proper closure applica-

tion. In addition, Alcoa developed a device called Proper Application Tester (PAT). In 1978, Alcoa published a revised proper application brochure which was disseminated throughout the bottling industry (Tr. 553; Ex. 129). In November, 1978, warnings regarding the possibility of personal injury as a result of closure misapplication were placed on Alcoa closure cartons shipped to bottlers (Tr. 554; Ex. 301).

The evidence is undisputed that 7-Up maintained exclusive control of the most effective means of warning the consumer. Plaintiff's expert testified a warning should have been placed on the label "which is from the 7-Up Company," and could not be on the closure itself (Tr. 137, 144; Ex. 139). Seven-Up U.S.A.'s director of engineering, operations and planning testified his company retained complete control over the labels placed on its bottles (Tr. 342).

Plaintiff's expert recommended the following warning: "Danger, Contents Under Pressure, Always Point Away From Face. Cap May Blow Off At Any Time, Especially While Opening" (Tr. 117-18). Plaintiff's evidence further established that a warning proscribing the use of a tool during the opening process was unnecessary (Tr. 118). It is folly to argue as does the majority author that the jury "could" have found Alcoa liable for failing to warn its customer (7-Up) regarding the possibility of tool removal when plaintiff's own evidence was that *no* such warning should have been given to the public. It cannot be disputed that 7-Up was in *the* position to pass whatever warnings were required to the consumer.

The *Alm* court applies Section 388 of the Restatement (Second) of Torts with a pragmatic rule for component parts cases, placing the duty to warn the ultimate consumer on the party best able to do so. The court likens Alcoa to a bulk supplier without a "package of its own on which to place a warning and (with) no control, except by contractual requirements, over the final package labeling which reaches consumers." *Id.*, at p. 6. On this point, the court cites *Jones v. Hittle Service, Inc.*, 219 Kan. 627, 549 P.2d 1383 (1976). The Kansas Supreme Court held that a manufacturer of LP gas sold in bulk to a distributor fulfills the duty to warn the ultimate consumer when it ascertains the distributor is adequately familiar with the safe use of gas and is capable of

passing such information to the consumer. The court held, as a matter of law, that the bulk seller had no duty to warn the distributor's customers under such circumstances.

Any other rule creates duties which are both unreasonable and impossible to satisfy. For example, Company S grows potatoes. Some of its potatoes are sold to Company C for use in instant mashed potatoes. In processing the potatoes, Company C uses a preservative. Statistically, one out of every ten million Americans is allergic to preservatives and once every one billion servings someone becomes seriously ill or dies as a result of exposure to it. Even though the potato grower has advised Company C of this danger and Company C acknowledges it has been so warned, under the duties proposed in the majority opinion, Company S would be liable for actual and exemplary damages as a matter of law for the potato grower's failure to warn the public. Alcoa does not believe this is the result intended by the Court's recent opinion. Such a standard would be both unrealistic and unfair. *Croteau v. Borden Company*, 277 F.Supp. 945 (E.D. PA. 1968), *aff'd* 395 F.2d 771 (3rd Cir. 1968).

Other jurisdictions which have considered this issue have found as a matter of law that a supplier discharges its duty to warn consumers by adequately warning its intermediary. See, *Berg v. Underwood Hair Adaptation Process, Inc.*, 751 F.2d 136 (2d Cir. 1984); *Manning v. Ashland Oil Co.*, 721 F.2d 192 (7th Cir. 1983); *Parkinson v. California Co.*, 255 F.2d 265 (10th Cir. 1958); *Zunck v. Gulf Oil Co.*, 224 S.2d 386 (Fla. Dist. Ct. App. 1969); *Younger v. Dow Corning Corp.*, 202 Kan. 674, 451 P.2d 177 (1969); *Hill v. Wilmington Chem. Corp.*, 279 Minn. 336, 156 N.W. 2d 898 (1968); *Reed v. Pennwalt Corp.*, 22 Wash. App. 718, 591 P.2d 478 (1979); *Morris v. Shell Oil Co.*, 467 S.W.2d 39 (Mo. 1971); *Shell Oil Co. v. Harrison*, 425 S.2d 67 (Fla. Ct. App. 1983).

The cases holding suppliers have no duty to warn the ultimate consumer, where the intermediary is informed of potential hazards, are in harmony with the recognized rule that assemblers of component parts are in the best position to warn consumers. For example, *Lee v. Butcher Boy*, 169 Cal. App. 3d 375, 315 Cal. Rptr. 195 (1985), is directly on point. Plaintiff

sought recovery from the manufacturer of an electrical motor. An intermediary incorporated the motor into a meat grinder which plaintiff was using when injured. Plaintiff argued the component manufacturer was under a duty to warn the ultimate consumer that the motor did not stop immediately after being switched off. The California court affirmed summary judgment for the component manufacturer. The court stressed that the component manufacturer had no control over the manufacture or packaging of the finished product. In such a case, the court held the component manufacturer had no duty to warn the consumer as a matter of law, since "the manufacturer of the finished product is in the best position to protect against and warn of the danger that arises after the non-defective component part is installed in the finished product." *Id.*, at 202.

The court in *Lee* also stated the established rule in negligent failure to warn cases that the likelihood of the injury, and the feasibility and beneficial effect of including warnings are factors which must be considered in allocating the duty to warn. *Id.*, at 201. *Accord, Butler v. L. Sonneborn Sons, Inc.*, 296 F.2d 623 (2d Cir. 1969); *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d. Cir. 1947). Based upon this reasoned view, Alcoa is entitled to judgment under the evidence presented.

The cases relied on in the majority opinion are fundamentally different from the component manufacturer situation. None of these cases involves the elements of (1) substantial change by the intermediary incorporating the non-defective component into a finished product which (2) is labeled and marketed by the intermediary outside the control of the component manufacturer.[3] The weight of authority imposes the

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3 See, *Seibel v. Symons Corp.*, 221 N.W. 2d 50 (N. Dakota 1974); *Hopkins v. Chip-In-Saw, Inc.*, 630 F.2d 616. These cases are fundamentally different from the instant case. Neither involves alteration of the product by the intermediary. The intermediaries did not label or market a finished product sold to a consumer. The manufacturer could easily affix the warnings to their own products. These cases are not analogous to the component part situation present here. Applying their holdings to these facts is arbitrary and unfair to Alcoa which has adequately warned its intermediary.

duty to warn the consumer on the assembler-intermediary where the component manufacturer has adequately warned and the intermediary is capable of warning the consumer. This rule is one of reason and is much more than an "unsupported conclusion that a warning to an intermediary ought to insulate a manufacturer from liability." *Sliman v. Alcoa*, slip opinion at p. 8, fn. 2.

The rule asserted by Alcoa is in harmony with the well-reasoned analysis of the duty to warn in components parts cases set out in the comment "Apportionment Between Part Makers and Assemblers in Strict Liability," 49 U. Chi. L. Rev. 544 (1982). Labeled the "cheapest cost avoider" analysis, it is argued courts should place the duty to warn the consumer on the party most capable of effectively doing so. Such an approach better assures needed warnings will actually be made. The author's conclusion in that comment is in full accord with Alcoa's position. *Id.*, at 553.

The approach asserted by Alcoa is also in harmony with a reasoned application of the Restatement (Second) of Torts, Section 388. The text of Section 388, and its illustrations and comments are devoid of explicit reference to the component part situation, where products undergo substantial change and are labeled by intermediaries. Nevertheless, Section 388 is easily applied in conjunction with the pragmatic rule for components cases described above. See *Alm v. Alcoa*, *supra*. Indeed, Comment N to Section 388 contains observations pertinent to the component parts cases:

> There is necessarily some chance that information given to the third person will not be communicated by him to those that are to use the chattel. This chance varies with circumstances existing at the time the chattel is turned over to the third person, or permission is given to him to allow others to use it. *These circumstances include the known or knowable character of the third person and may also include the purpose for which the chattel is given. Modern life would be intolerable unless one were*

*permitted to rely to a certain extent on others' doing what they normally do, particularly if it is their duty to do so.*

In the case at bar, the chattel was given by Alcoa for the undisputed purpose of being incorporated in a finished consumer product to be labeled and marketed by others. It is patently unfair to hold Alcoa's duty as not discharged by its undisputedly adequate warnings to the bottler. The Restatement also implicitly recognizes the importance of distinguishing component parts cases from other situations:

> Many such articles can be made to carry their own message to the understanding of those who are likely to use them by the form in which they are put out, by the container in which they are supplied, or by a label or other device, indicating with substantial sufficiency their dangerous character.

The unthreaded closure provided by Alcoa is not such an article which can effectively be made to carry its own warning. Rather, the completed consumer product manufactured by others in the distribution chain is such a product. Alcoa's duty to warn the ultimate consumer was discharged by its warnings to 7-Up. This rule is in full accord with the policies of Section 388 and tort law generally. Authors Frumer and Freidman specifically recognize this rule, as incorporated in the Kasten bill, in their treatise. See 1A, L. Frumer and M. Freidman, *Products Liability*, Section 8.03(3), p. 183. Moreover, Professor Wade recognizes the duty to warn should lie with the manufacturer of the finished product, where a non-defective component is "processed" by the intermediary. See Wade, *On The Nature of Strict Tort Liability for Products*, 44 Miss. L. J. 825, 848 (1973).

The initial opinion affirms the award of punitive damages, although the efficacy of Alcoa's warnings to Seven-Up, U.S.A. and the feasibility of Alcoa warning the ultimate consumers were not among the issues tried below. Such a result is an arbitrary penalty violating due process of law under the Fourteenth Amendment to the United States Constitution.

All of the evidence showed that Alcoa's warnings to its customer 7-Up was adequate.[4] It is patently unfair to hold Alcoa liable for exemplary damages for 7-Up's failure to pass that warning to Mrs. Sliman. Exemplary damages are not favored at law. Further, an award of exemplary damages must be supported by a showing of "willful intent" or "harmful state of mind." *Cheney v. Palos Verdes Inn Corp.*, 104 Idaho 897, 665 P.2d 661 (1983). To hold that Alcoa, the only entity that warned anyone is liable for such damages is error as a matter of law based on the evidence before this Court.[5]

The United States Supreme Court has recognized the "quasi-criminal" nature of punitive damages. *Boyd v. U.S.*, 116 U.S. 616, 634 (1886). In 1983 a dissenting member of the court recognized that the imposition of punitive damages is unaccompanied by the types of safeguards normally present in criminal proceedings. *Smith v. Wade*, 461 U.S. 30, 59 (1983). This court, in its initial opinion, also recognizes the "punitive aspect to punitive damages," *Sliman v. Alcoa*, slip opinion at 17.

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4 The majority relies on the evidence of previous blow-offs due to bottler *misapplication* to support a finding against Alcoa for Mrs. Sliman's unique accident. The admission of such evidence was improper. It is similar to allowing evidence of every gunshot wound *no matter how inflicted* in an action against a gun manufacturer to establish "notice" of a hazard it never denied being aware of. The issue is not was Alcoa aware of the risk of blow off due to misapplication. Alcoa never denied it was. The issue is whether that risk had any relationship to Mrs. Sliman's accident. It did not. *Hale v. Firestone Tire & Rubber Co.*, 765 F.2d 1322 (8th Cir. 1985). To admit such evidence was prejudicial error. *Uitts v. General Motors Corp.*, 411 F.Supp. 1380, 1382 (E.D. PA. 1974).

5 The majority relies on Mr. Greene's testimony of "gross deviation" to support its affirmance of an award of exemplary damages. In finding that testimony admissible, the Court overrules Alcoa's "archaic" argument that an expert cannot testify about an "ultimate fact." That was *never* Alcoa's position and fair reading of Alcoa's appellate brief would so indicate. Alcoa maintains that *no* expert is *qualified* to render an opinion as to the intent or character of a defendant's acts. To allow a witness to so testify is tantamount to permitting an experienced detective to testify that a criminal defendant acted with malice in committing a crime. *United States v. Pino*, 606 F.2d 908 (10th Cir. 1979).

In this case, Alcoa has been penalized in an arbitrary fashion under a standard first promulgated by the Court in this appeal. Alcoa is here subjected to punitive damages without the normal safeguards applied in *civil* proceedings. Such a result violates Alcoa's right to due process of law under the Fourteenth Amendment to the United States Constitution. *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed.2d 491, 88 S. Ct. 1444 (1968).

The evidence presented at trial established that Alcoa adequately advised its customer 7-Up of the risks incident to the use of its unthreaded closure. Therefore, even under the *Alm* rule embraced by this Court, it is entitled to judgment on that issue. At a very minimum, Alcoa is entitled to retrial on the issue of liability before a jury properly instructed under this Court's recent opinion. *Vannoy v. Uniroyal Tire Company*, 85 ISCR 2269 (November 22, 1985).

## CONCLUSION

Alcoa is mindful of the burden it carries in requesting rehearing of an opinion so long considered and strongly argued among the members of this Court. The impact of the decision as given, however, is so great that a rehearing is not only appropriate but necessary.

This Court, in its opinion, has placed new and expanded duties on component part suppliers. Alcoa is confident the Court attempted to make those duties consistent with the real world and the law established by other Courts which have considered this issue. Unfortunately, the opinion as written does neither. More importantly, it is at odds with the reasoning that supports the imposition of any tort duty.

At a minimum, this Court should allow Alcoa the right to litigate its newly acquired obligations under proper instructions before a jury. To do any less is to deny Alcoa the due process and substantial justice requirements the Constitution guarantees to all. This Court understands that there is a principle beyond the principal involved in this particular case. Alcoa asks the Court to address in rehearing the very real questions

which need to be answered as a result of its recent opinion. Is it fair to hold Alcoa liable for exemplary damages as a matter of law for its conduct in 1979 under a new tort duty about which this Court cannot agree in 1986? Is it right to deny Alcoa a jury trial on the obligation fixed upon it *after* the trial of this case? Is it just to place upon Alcoa a duty to warn which in reality cannot be fulfilled? Does there exist a reason in fact, law or policy to extend this duty to Alcoa when it is most properly placed upon the final supplier, 7-Up, which was before the Court and held liable to plaintiff in this case?

It is unlikely Alcoa will move that Court to sympathize with the monetary result created by its recent opinion. However, Alcoa must ask the Court to appreciate the profound impact and substantial inequity which its current opinion places on an entire class of defendants which have attempted to act as competent and concerned citizens. Under the majority's ruling, Alcoa has been denied the right to litigate its conduct before a jury under proper instruction. Alcoa asks for no more than a fair hearing on this issue and it is certainly entitled to no less.

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CERTIFICATE OF MAILING

This is to certify that on this 12 day of December, 1986, a true and correct copy of the above and foregoing Petition for Rehearing was mailed to:

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Larry D. Ottaway
G. David Ross

# Relevant Instructions from the Jury Charge

## INSTRUCTION NO. 17

A manufacturer of a product includes any person who designs, manufactures or remanufactures that product or any component parts before its sale to a consumer. A person designs a product if he prepares or provides the design for that product.

## INSTRUCTION NO. 21

You are instructed that even if a product is safely designed and manufactured, it can nevertheless be unreasonably dangerous or defective, as those terms are defined to you in these instructions if the manufacturer has reason to know of dangerous propensities of the product, but fails adequately to warn purchasers or users of said dangerous propensities.

## INSTRUCTION NO. 45

If you find that a defendant's acts which proximately caused injury to the plaintiffs were an extreme deviation from reasonable standards of conduct and that these acts were performed by that defendant with a reckless disregard of their likely consequences, you may, in addition to any damages to which you find a plaintiff entitled, award to plaintiff an amount which will, by punishing the defendant or defendants involved, serve to deter the defendant or defendants and others from engaging in similar conduct in the future. If you find such an additional award is necessary, the amount of the award must bear some reasonable relation to the plaintiff's actual damages, the cause thereof, the defendant's conduct, and the objective of deterring similar conduct.

# Special Verdict of the Jury

IN THE

DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

Case No. 31927

DAVID SLIMAN and CAROLYN SLIMAN, husband and wife,

*Plaintiffs,*

—v.—

SEVEN-UP U.S.A., INC., a Missouri corporation, ALUMINUM COMPANY OF AMERICA, a Pennsylvania corporation, THE CONTINENTAL GROUP, INC., a New York corporation, NOEL CANNING CORPORATION, a foreign corporation, 7-UP BOTTLING COMPANY OF TWIN FALLS, IDAHO, an Idaho corporation, SAFEWAY STORES INCORPORATED, a Maryland corporation, PEPSI-COLA, a foreign corporation, and JOHN DOES 1 through 10, ABC PARTNERSHIPS 1 through 10, or XYZ CORPORATIONS 1 through 10,

*Defendants.*

## SPECIAL VERDICT

We, the jury, answer the questions submitted to us in the Special Verdict as follows:

*QUESTION NO. 1:* Was there negligence on the part of the defendant Seven-Up U.S.A., Inc., which was a proximate cause of the plaintiff's injuries?

*ANSWER:* Yes ✓ No ____

*QUESTION NO. 2:* Was there negligence on the part of the defendant Aluminum Company of America which was a proximate cause of the plaintiff's injuries?

*ANSWER:* Yes ✓ No ____

*QUESTION NO. 3:* Was there negligence on the part of the defendant The Continental Group, Inc., which was a proximate cause of the plaintiff's injuries?

*ANSWER:* Yes ✓ No ____

*QUESTION NO. 4:* Was there negligence on the part of the defendant Pepsi-Cola Bottling Company of Yakima which was a proximate cause of the plaintiff's injuries?

*ANSWER:* Yes ✓ No ____

*QUESTION NO. 5:* Was there negligence on the part of the plaintiff, Carolyn Sliman, which was a proximate cause of the plaintiff's injuries?

*ANSWER:* Yes ✓ No ____

*QUESTION NO. 6:* Was the filled 2-liter bottle with aluminum closure in a defective condition unreasonably dangerous to person at the time of its purchase?

*ANSWER:* Yes ✓ No ____

If your answer to question number 6 is "yes," then answer question number 7.

*QUESTION NO. 7:* If so, was the unreasonably dangerous defective condition of the filled 2-liter bottle a proximate cause of the plaintiff's injuries?

*ANSWER:* Yes ✓ No ____

If your answer to questions 6 and 7 are "yes," then answer question number 8. If your answers to either 6 or 7 was "no," then do not answer questions 8 or 9.

*QUESTION NO. 8:* Did plaintiff Carolyn Sliman misuse the product?

*ANSWER:* Yes ✓ No ____

If your answer to question number 8 was "yes," then answer question number 9. If your answer was "no," then go to question number 10 if the directions call for it.

*QUESTION NO. 9:* Was the misuse of the product a proximate cause of the plaintiff's injuries?

*ANSWER:* Yes ✓ No ____

Answer question number 10 only if you found that any defendant was negligent and/or that the product was defective and unreasonably dangerous *and* that such negligence and/or defect proximately caused the injury to the plaintiff. If you are not required to answer question number 10, your job is done! Sign the verdict form and return it into open court.

*QUESTION NO. 10:* We find that each of the parties listed below were at fault for the plaintiff's injuries in the following percentages:

| | |
|---|---|
| (a) The plaintiff Carolyn Sliman | 25% |
| (b) Defendant Seven-Up U.S.A., Inc. | 45% |
| (c) Defendant Aluminum Company of America | 30% |
| (d) Defendant The Continental Group, Inc. | 0% |
| (e) Defendant Noel Canning Corporation | 0% |
| (f) Defendant 7-Up Bottling Company of Twin Falls | 0% |
| (g) Defendant Safeway Stores Incorporated | 0% |
| (h) Defendant Pepsi-Cola Bottling Company of Yakima | 0% |
| TOTAL | 100% |

Answer question number 11 if you find that the percentage of fault of any defendant was greater than that of the plaintiff. If you do not need to answer question number 11, your job is done! Sign the verdict form and return it into open court.

*QUESTION NO. 11:* What is the total amount of damages sustained by the plaintiffs David and Carolyn Sliman?

*ANSWER:* $100,000

*QUESTION NO. 12:* Did defendant Seven-Up U.S.A. show a reckless disregard for plaintiff's safety and an extreme deviation from standards of reasonable conduct?

*ANSWER:* Yes ✓ No ____

*QUESTION NO. 13:* Did defendant Alcoa show a reckless disregard for *plaintiff's safety* and an extreme deviation from standards of reasonable conduct?

*ANSWER:* Yes ✓ No ____

Answer questions 14 and/or 15, if, and only if, you answered "yes" to question 12 and/or 13. Only award punitive damages against the defendant(s) affirmatively covered in the previous two questions.

*QUESTION NO. 14:* What is the total amount of punitive damages necessary to deter Seven-Up U.S.A. and/or others from future conduct?

*ANSWER:* $200,000

*QUESTION NO. 15:* What is the total amount of punitive damages necessary to deter Alcoa and/or others from future conduct?

*ANSWER:* $100,000

/s/ ALFRED R. IVERSON
*Foreman*

RANDY C. ROBBINS
OLETA GOULD
GERY JOSLIN
ERNEST SAUMONT
BONNIE NEWMAN
DENNIS AUSCHEL
WILMA E. GIBBS
SANDY JONES

# List of Companies (other than wholly-owned subsidiaries) in which Alcoa has an ownership interest

## FIRMS (OTHER THAN WHOLLY-OWNED SUBSIDIARIES) IN WHICH ALUMINUM COMPANY OF AMERICA HAS OWNERSHIP INTERESTS

Ace Limited
Acme Metal Works, Ltd.
Aco, S.A.
Aco Alquiler, S.A.
Aco Alquiler Barquisimeto, S.A.
Aco Alquiler Occidente, S.A.
Aco Alquiler Oriente, S.A.
Aco Barquisimeto, S.A.
Aco Guayana, S.A.
Aco Hidraulica, S.A.
Aco Inversora, S.A.
Aco Occidente, S.A.
Aco Oriente, S.A.
Aco Valencia, S.A.
Acometales, S.A.
Adela Investment Company, S.A.
Administradora Almonital, C.A.
Administradora Maracay, C.A.
A.F.P. Pty. Limited
Agro Andina, S.A.
Agroven, C.A.
Agroven (Valle de La Pascua), C.A.
Aguas Industriales "La Presa" A.C.
Alcoa Aluminio, S.A.
Alcoa Aluminio Do Nordeste, S.A.
Alcoa Conductor Accessories, Inc.
Alcoa Extruded Products (UK) Limited
Alcoa Fujikura Ltd.
Alcoa of Australia Limited
Alcoa of Australia (Asia) Limited
Alcoa Manufacturing (G.B.) Limited
Alcoa Mineracao, S.A.
Alcoa Nederland, B.V.
Alcoa-NEC Communications, Corp.

Alcoa (Bunbury) Pty. Limited
Almexa, S.A. de C.V.
Aludril, Inc.
Aludrum B.V.
Alumar Administracao de Bens, S.A.
Alumar Administracao Industrial, S.A.
Alumet Etten, B.V.
Aluminio, S.A. de C.V.
Aluminio Do Sul, S.A.
Alusud Engenharia Ltda.
Aluwhite Electropaint Limited
Amortiguadores, S.A.
Amuay Motors, C.A.
Armas, S.A.
Arneses y Accesorios de Mexico, S.A. de C.V.
Arrendamientos Aco, S.A.
A/S Skibsinvestering
Asmeca, S.A.
Auto Acarigua, C.A.
Auto Amortiguadores Maturin, S.R.L.
Auto Cabimas, S.A.
Auto Caracas, S.A.
Auto Caracas II, S.A.
Auto Inversora Lamax, S.A.
Auto Oriente, S.A.
Auto Oriente Maturin, S.A.
Auto Servicio Cabimas, S.A.
Auto Servicio Caracas, S.A.
Autoenmar, C.A.
Autoespuma, C.A.
Automotriz Andina, S.A.
Automotriz Centragro, C.A.
Automotriz el Trebol, S.A.
Automotriz Lamax, S.A.
Automotriz Panamericana, S.A.
Automotriz Veritas, S.A.
Automotriz Vigia, S.A.
Autoservicio Maturin, C.A.

Boke Service Company, S.A.
Boke Trading, Inc.
B.W.P. (Architectural) Limited
Cafe Tachira, S.A.
Capsulas Metalicas, S.A.
Centro Servicio Automotriz, S.A.
Centromotriz Zulia, C.A.
Ceramics Process Systems Corporation
Coala Insurance Company Limited
Compagnie des Bauxites de Guinee
Companhia Geral de Minas
Complejo Industrial Pedernales, S.A.
Constructora Venezolana de Vehiculos, C.A.
Convemet, S.A.
Corporate Insurance and Reinsurance Company Limited
Corporation for Innovation Development
Covenal Integracion, C.A.
Cummins de Venezuela, S.A.
Deformaciones Plasticas de Metales, C.A.
Delaney Management Company, Inc.
Delta America Re Insurance Company
Delta Holdings, Inc.
Delta International Insurance Company Limited
Distribudora Covenal, C.A.
Distribuidora Taunica, C.A.
Dowell Australia Limited
Dowell Brett Pty. Limited
Drumalu B.V.
Elkem A/S & Co.
Empresa Imobiliaria Maranhense Ltda.
Engineered Plastic Components, Inc.
Enmar, C.A.
Espumacar, S.A.
Estampados Del Caribe, C.A.
Expoauto, C.A.
Fabrica de Carrocerias Centauro, C.A.
Fabrica Nacional de Tractores y Motores, S.A.
Fabrica National de Forros y Accesorios Para Carros, C.A.

Famoven-Goulds, C.A.
Fianzas y Garantias Centa, S.A.
Filtravedo, S.A.
Flotillas y Arrendamientos, C.A.
Flotillera Oriental, C.A.
Fluorsid, S.p.A.
Forauto, C.A.
Forges de Bologne, S.A.
Franquicias Unidas Occidente, S.A.
Fundimec, S.A.
Funmar, S.A.
Greater Lebanon Hotel Enterprises, Inc.
Grupo Aluminio, S.A. de C.V.
Grupo Covenal Mariara, C.A.
Halco (Mining) Inc.
Harmonia Corretora de Seguros, S.A.
Harmony Trading & Services Company
Hidromex Venezolana, C.A.
Hopewell International Insurance Ltd.
Ideal Dominicana, S.A.
Imobiliaria Vargem Dos Bois S/C Ltda.
Induction Billet Corporation
Industrial Ipercosma, C.A.
Industrial Vigia, S.A.
Industrias Fairbanks Morse de Venezuela, C.A.
Industrias Mariara, S.A.
Inmobiliaria Aluminio, S.A. de C.V.
Inmobiliaria Araure, S.A.
Intal, B.V.
Inversiones Almonital, C.A.
Inversiones Araco, C.A.
Inversiones Auven, C.A.
Inversiones Metalurgicas, C.A.
Inversiones Rialpe, S.A.
Inversora Baralt, C.A.
Inversora Central, C.A.
Inversora Covenal, C.A.
Inversora Orinoco, C.A.

Inversora Veritas, C.A.
La Casa Del Amortiguador, S.A.
La Casa Del Amortiguador Barquisimeto, S.A.
Lago Motors, C.A.
Lamax, S.A.
Lamitref Aluminium N.V.
Lancer Financial Group
Lancer Insurance Company
Lips-Levolor, B.V.
MRCP Limited
Maquinarias Acarigua, S.A.
Maquinarias Aco, S.A.
Maquinarias De Occidente, S.A.
Maquinarias Maracay, C.A.
Maquinarias Y Servicios Aco, S.A.
Metalmar, C.A.
Mineracao Ceu Estrelado Limitada
Mineraria Silius, S.p.A.
Moralco Limited
Mosal Aluminum
Motaller, C.A.
Motores La Via, C.A.
Motoriente Anaco, C.A.
Motoriente Ciudad Bolivar, C.A.
Motoriente El Tigre, C.A.
Motoriente Puerto Ordaz, S.A.
Motoriente San Felix, C.A.
Motoservicio Ciudad Bolivar, C.A.
Motoservicio San Felix, C.A.
N.V. Hotelmaatschappij "Torarica"
Norsk Alcoa A/S
Oak Mountain Office Park, Inc.
Occidente Motors, S.A.
Occidente Motors Yaracuy, S.A.
Perfilap Participacoes S/C Ltda.
Pimalco, Inc.
Pimalco Seamless, Inc.
Plascon, C.A.
Portland Smelter Services Pty. Ltd.

Procesos Galvanicos, S.A.
Servicentro Industrial, S.A.
Servicio Centa, C.A.
Servicios McPherson, S.R.L.
Servicios Mecanicos, S.A.
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Shibazaki Seisakusho Limited
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Sinterizados Del Caribe, C.A.
Societe De Ceramiques Techniques, S.A.
Swanal Limited
T.G.A. Pty. Limited
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Taller Agromecanica, C.A.
Taller Centroservicio Zulia, C.A.
Talleres Centagro, C.A.
Talleres Guayana, C.A.
Talleres Serindus, C.A.
Talleres Unidos, C.A.
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Technologia Mecanica, C.A.
The Glass & Aluminium Suppliers Pty. Limited
Tortuga Casualty Company
Tracto Guayana, S.A.
Tractosur, C.A.
Transit Casualty Syndicate, Inc.
Trefilerias Mariara, C.A.
Tupla, C.A.
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Valfor, S.A.
Venezolana De Produccion Renault, C.A.

No. 86-1569

In the
# Supreme Court of the United States
October Term, 1986

Aluminum Company of America,

*Petitioner,*

—v—

David Sliman and Carolyn Sliman,

*Respondents.*

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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In the
# Supreme Court of the United States
October Term, 1986
NO. 86-1569

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ALUMINUM COMPANY OF AMERICA,
*Petitioner,*

—v—

DAVID SLIMAN and CAROLYN SLIMAN,
*Respondents.*

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## JURISDICTION

Jurisdiction of the Court is predicated on an issue of due process of law under the United States Constitution, Amendment XIV. As demonstrated in the argument hereafter, no substantial constitutional issue is presented, and accordingly the certiorari jurisdiction of the Court is not demonstrated.

## STATEMENT OF FACTS

The statement of facts presented by the Petitioner Aluminum Company of America (hereinafter "Alcoa") is satisfactory, subject to clarifications and corrections set forth hereafter.

In addition to having supplied unfinished aluminum shells or "blank" closures to soda bottlers, Alcoa designed, patented and presented to the soft drink industry in 1967 the entire system for twist-off aluminum caps, including specifications for bottle finish, closure design, and design of capping

machines. *Sliman* v. *Aluminum Company of America*, ____ Idaho ____, 731 P.2d 1267, 1268 (1986); *Alm* v. *Aluminum Company of America*, 717 S.W.2d 588, at 589 (Tex. 1986).

Mrs. Sliman did not "tear" the cap from the bottle of soda; rather, believing that the pilfer-proof band must be removed prior to removing the twist-off cap, she was engaged in attempting to remove the pilfer-proof band with pliers when the cap exploded off the pressurized bottle.

That 83 billion other aluminum caps had been removed by conventional twist-off process without incident prior to Mrs. Sliman's injury is inaccurate; varied means of opening soda bottles were common, as were incidents of forcible blowoff (opinion below, *Sliman* v. *Aluminum Company of America*, *supra*, 731 P.2d 1267 at 1273, n. 4; *Id.* at 1276, n. 8).

There existed no difference between the treatment given by the trial court and the Idaho Supreme Court as to the duty of Alcoa to warn consumers. The trial court instructed the jury that a manufacturer, including a component part supplier, may be liable if it fails adequately to warn purchasers or users, and the Supreme Court of Idaho held only that a manufacturer could effect those warnings through an intermediary, or by direct warning to the ultimate purchaser. Thus, the Idaho Supreme Court, in that regard, dealt only with the manner in which a duty might be discharged and liability avoided, and did not add to the legal theories applied at trial, that is, that the manufacturer of a component part may under some circumstances owe a duty to warn, and may not in all circumstances rely on warnings provided to intermediate purchasers.

## SUMMARY OF ARGUMENT

Judicial decisions ordinarily apply both retroactively and prospectively. Retroactive application will only be precluded under circumstances in which the decision represents a departure from former law or announces a new rule of law which was not clearly foreshadowed by existing law, and under circumstances where retroactivity will tend to retard, rather than further the effective operation of the judicial decision, and may result in injustice. The instant case does not meet these criteria which are utilized to overcome an otherwise applicable presumption of retroactive effect of judicial decisions.

The opinion below did not constitute any significant change or unexpected resolution of Idaho law; it simply expanded the already existing Idaho law and the current trend of the law in products liability cases to the facts of the instant case, and the result below could reasonably be foreseen as a probable extension of Idaho law. Further, the Petitioner was not restricted in any way in presenting its evidence or preserving its record with respect to the legal theories upon which the case was tried, and was denied no opportunity to present its defense either in the trial court or by properly preserved issues on appeal to the Supreme Court of Idaho. Accordingly, no substantial deprivation of due process of law occurred in the proceedings below, and review by certiorari should be denied.

## ARGUMENT

It is well recognized as a general rule that judicial decisions apply both retroactively and prospectively, and are presumed to apply retroactively, *Solem* v. *Stumes,* 465 U.S. 638, 642 (1984). Where retroactive

application of a decision is considered to be inappropriate, any such exception to the general rule must be based on "the interest of justice" and "the exigencies of the situation," *Id.*

In *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107, (1971) this Court set forth three elements of a balancing test to determine in a civil context whether a judicial decision should receive prospective application only. First, it was said that for the decision to be applied nonretroactively, it must establish a new principal of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was "not clearly foreshadowed," *Id.* at 106. Second, the Court would look to the prior history of the rule in question to determine whether retroactive operation would further or retard its operation, and finally, will weigh any possible inequity or injustice imposed by retroactive application, *Id.* at 106-107.

Applying the first of these elements, the decision below clearly overrules no prior established precedent, and the inquiry therefore must be whether the result below, under Idaho law, was not clearly foreshadowed. Cases subsequent to *Chevron Oil* have cast the inquiry in terms of whether the interpretation of state law was "unexpected," *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85-86 n. 9 (1979), or represented a "sharp break" from prior precedent or the trend of prior precedent, see, e.g., *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 499 (1968). At least one circuit court has posed the question as whether reliance on a contrary or different rule was so justified and the frustration of expectation so detrimental as to require deviation from the traditional presumption of retroactivity, *Simpson* v.

*Director, Office of Workers Comp. Programs*, 681 F.2d 81, 87 (1st Cir. 1982).

In the present case, it is quite clear that the duty to warn by the supplier of a component part, when that part was indeed the instrument of injury, was clearly foreshadowed by previous decisions of the State of Idaho and other authorities. As the court below noted, the Idaho Supreme Court had held as early as 1973 that if a supplier of a product knows or has reason to know that the product is likely to be unsafe when used for the purpose for which it is supplied, and has no reason to believe that persons for whose use the product was supplied will realize its unsafe condition, then the supplier has a duty to exercise reasonable care adequately to warn them of the unsafe condition or of the facts which make the product likely to be dangerous, *Sliman* v. *Aluminum Company of America*, *supra*, 731 P.2d at 1270; *Robinson* v. *Williamsen Idaho Equipment Co.*, 94 Idaho 819, 825, 498 P.2d 1292, 1298 (1973) (citing Restatement (Second) of Torts §§ 333-397). By the following year, Idaho had adopted the Restatement (Second) of Torts, §402A, including comment h thereto, establishing that if the defendant has reason to anticipate that danger may result from a particular use of his product and he fails to give adequate warnings of such danger a product sold without such warning is in a defective condition, *Rindlisbaker* v. *Wilson*, 95 Idaho 752, 759, 519 P.2d 421, 428 (1974).

Given these basic premises, it was clearly foreshadowed that when, as in the instant case the manufacturer of a product which was a component part of another product (and which was indeed the very product which caused the injury) has knowledge that its product, manufactured under its own design,

and used in accordance with design and specifications which the component part manufacturer itself had developed and presented to the industry, *Sliman*, 731 P.2d at 1268, it was extremely logical that Idaho courts would, under appropriate facts, impose liability on the manufacturer of the component part. Alcoa is not substantially helped by its pretense that the instrumentality of injury was the finished and bottled product of soda, i.e., that the instrumentality of injury was the customer's product (Petition, at p.4). Bottles of soda, in and of themselves, with closures other than those as designed and manufactured by Alcoa presented no substantial hazard as to which warnings were required. The single element which presented a hazard to consumers' eyes was not the product of 7-Up, but the specific product designed, and in this case manufactured by Alcoa.

Moreover, consistently from 1965, when the applicable edition of the Restatement was printed, and at approximately the same time Alcoa presented its original design and closure system to the soft drink industry in 1967, *Sliman*, at 1269, the body of case law outside Idaho consistently trended toward the imposition of liability upon manufacturers who sell through intermediaries, see, generally 1A Frumer & Friedman, *Products Liability*, § 8.03 [3]. Even though the Idaho Supreme Court had not had the opportunity to deal directly with a product manufacturer whose product reached the consumer through an intermediary manufacturing process, it was "clearly foreshadowed" that at the least, the law of Idaho would impose upon such a product manufacturer the duties forewarned in the Restatement (Second) of Forts, § 388, comment n, and § 402A, comment j. Thus, it was clearly foreshadowed under not only Idaho decisions,

but persuasive authority from other jurisdictions that in a situation such as obtains here, where the component part manufacturer had specifically created the design and system for use of its product as a component part of the ultimate product reaching the consumer, and having knowledge that the ultimate product (bottle of soda) utilizing the closure designed and presented by Alcoa could under some circumstances pose substantial hazard to the eyes of consumers, it would be a fact question for the jury as to whether warnings given only to intermediate bottlers, and reliance on those warnings notwithstanding express knowledge that intermediate bottlers were not communicating such warnings on to consumers, was reasonable, *Sliman, supra,* at 1270-73.

Alcoa was unquestionably on notice, for purposes of opportunity to litigate the issues below, that the law of Idaho had for many years recognized the concept of punitive damages under circumstances of serious misfeasance or nonfeasance by a defendant, see, *Boise Dodge, Inc.* v. *Clark,* 92 Idaho 902, 908, 453 P.2d 551, 557 (1969); *Jolley* v. *Puregro Co.,* 94 Idaho 702, 496 P.2d 939 (1972). Although Idaho law had not previously specifically imposed punitive damages upon a product supplier in a products liability case, numerous other state authorities had imposed punitive damages in products liability cases involving failure to warn, premised, as in the instant case, on failure to take adequate action to warn of risks associated with the product, notwithstanding specific knowledge of numerous incidents of injury. See, generally, Annotation, *Allowance of Punitive Damages in Products Liability Cases,* 29 ALR 3rd 1021. Consequently, Alcoa had no reasonable justification for relying on any belief that it would in all cases be protected

against the imposition of punitive damages simply by warning intermediate bottlers while having specific knowledge, based upon 229 claims made against it prior to the injury to the Plaintiff below, that warnings were not being extended to consumers actually using the product which Alcoa designed.

Applying the second factor set forth in *Chevron Oil*, it is clear that retrospective operation of the ruling below will further, rather than retard operation of that holding. Prospective application only would, by its terms, essentially negate the judgment below, or at minimum require a costly and time consuming new trial. Further, prospective application only would cast in doubt the status of law in Idaho relative to the impact of the decision on cases pending before the decision was announced as compared to causes of action rising or litigation actually commenced after the decision.

Finally, retroactive application produces no substantial inequitable results in any similar individual cases. In the instant case, the nature of the holding is not of a type which will defeat the reasonable expectations of litigants in individual cases other than Alcoa itself. Here, the ruling below does not represent any substantial departure from past judicial decisions upon which litigants might reasonably rely, as, for example, in instances where a significant ruling is made with respect to statute of limitations as in *Wilson* v. *Garcia*, 471 U.S. 261 (1985). See also, *Northern Pipeline Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50, 88 (1982) (ruling of unconstitutionality of Bankruptcy Act of 1978, if retroactively applied, would result in hardship upon litigants who relied on jurisdiction of bankruptcy courts). In the instant case, Alcoa is the only entity which may have relied, at its

own peril, on its belief as to future ruling of the Supreme Court of Idaho.

Neither does the retroactive application of the decision below result in an effective denial of due process to Alcoa. Alcoa makes no showing that it was in any way restricted in the presentation of its evidence as in *Saunders* v. *Shaw*, 244 U.S. 317 (1917). or as in *Georgia Ry. & El. Co.* v. *Decatur*, 295 U.S. 165, 171 (1935), upon which it relies. Alcoa makes no showing that it was unaware of the issues litigated below, or lacked any opportunity to either obtain appropriate jury instructions from the trial court or preserve its record and appeal deficiencies in the jury instructions. *Alm* v. *Aluminum Company of America*, 717 S.W.2d 588 (Tex. 1986), upon which Alcoa relies in support of its contention that remand for new trial is required to preserve concepts of due process, does not require that result. In the first instance, the Supreme Court of Texas did not remand the matter for further trial proceedings, but only remanded to the Texas Court of appeals for further findings with respect to sufficiency of the evidence on the issues actually litigated, in light of the opinion of the Texas Supreme Court. Further, in *Alm*, Alcoa had specifically and thoroughly preserved below its issues relative to sufficiency of pleadings and jury instructions, and presented those issues in the appeal process, *Id.* at 597. Here, Alcoa presented no issues to the Supreme Court of Idaho regarding the adequacy of jury instructions and accordingly that court decided no such issues. Having failed to thus present issues to the Idaho Supreme Court which might have avoided the current contention that Alcoa was precluded in some fashion from presenting evidence, it cannot now complain that it was denied basic due process of law. In the proceedings below,

both in trial and on appeal, Alcoa was given full latitude in the presentation of evidence, and was not restricted in its opportunity to preserve and present on appeal issues relative to its duty, see, *Hamling* v. *United States*, 418 U.S. 87, 110 n. 11 (1974). Alcoa's sole complaint appears to be only that it chose in the appeal below to rely on the insufficiency of the evidence to establish that it had any duty to warn at all. Nevertheless, Alcoa did present at trial evidence that it had warned intermediate bottlers, while functionally conceding that it had made no effort either to warn consumers or to insure that intermediaries did so, *Sliman*, at 1269-70. Further, the trial court instructed the jury that the adequacy of warnings was an issue to be considered (Petition, App. 53a). Alcoa was therefore free to present evidence or argue alternatively that even if it had a duty to warn, the warnings provided to the intermediaries were adequate. If Alcoa was dissatisfied with content of the instruction, it had every opportunity to raise sufficiency of instructions in the appeal below, but did not do so.

*Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. ____, 106 S.Ct. 1580 (1986), upon which Alcoa relies, does not compel the conclusion that certiorari is required to redress a possible infringement upon constitutional due process. There, this Court expressed its concern regarding imposition of punitive damages in a bad faith insurance settlement claim, where partial payment of the underlying claim, previously recognized under Alabama law as evidence of good faith, was demonstrated in the record. Evident also was some concern of the Court regarding, under those circumstances, an award of punitive damages of $3.5 million, substantially in excess of any previous reported Alabama decision, *Id.* at 106 S.Ct. 1586. No

such considerations obtain in the present case. Alcoa demonstrates no prior Idaho law which would justify a conclusion that the holding below represented any significant departure from either prior decisions or a probable course of future decisions as suggested by previous decisions of the Idaho Supreme Court. Thus, the present case, unlike the fact situation involved in *Aetna Life Ins. of Co.* v. *Lavoie,* does not involve any new and unanticipated principal of law which can be said to constitute a new rule in place of some previous rule or trend, Cf. *United States* v. *Johnson,* 457 U.S. 537, 550 n. 12, 551 (1982). The Idaho Supreme Court did no more than apply its own precedent, together with precedent from other jurisdictions, to a precise set of facts which it had not therefore encountered. Since Alcoa was in no way restricted in the presentation of its evidence or the preservation of its record for appeal under state law, it was not denied its opportunity to be heard.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

ALUMINUM COMPANY OF AMERICA,

*Petitioner*,

—v.—

DAVID SLIMAN and CAROLYN SLIMAN,

*Respondents*.

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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ALUMINUM COMPANY OF AMERICA,

*Petitioner*,

—v.—

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*Respondents*.

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

Respondents' brief addresses the standards which determine whether a judicial decision awarding *compensatory* damages will be applied retroactively. This analysis would be apposite if Alcoa had contended that it could not be liable for compensatory *or* punitive damages for failure to meet its newly enunciated duty to warn. Alcoa has not done so.[1]

As Alcoa's petition demonstrates, and this Court has recognized, special due process concerns are implicated when a person is *punished* for failure to meet a legal duty that did not

1 As discussed in Point II of its petition, Alcoa is entitled to retrial before a jury that has been charged under the standard enunciated by the Idaho Supreme Court. While Alcoa would hope to establish that it met that standard, if it does not, it recognizes that it would be liable to respondents for compensatory damages.

exist when the challenged conduct occurred. Respondents totally ignore the distinction between punishment, such as occurred here, and the award of compensatory damages. This Court has recognized that the issue of whether punitive damages may be retrospectively imposed under a new cause of action is one that "must be resolved." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. ____, 106 S. Ct. 1580, 1589 (1986). This is the case in which to do so.

Respectfully submitted,

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